Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner, State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon entered in this proceeding on December 31, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing and remanding Hass's burglary conviction, Appendix C hereto, is reported at 97 Or. Adv. Sh. 200, 13 Or. App. 368, 510 P.2d 852 (1973). The opinion of the Supreme Court of the State of Oregon affirming the decision of the court of appeals, Appendix A hereto, is reported at 98 Or. Adv. Sh. 561, — Or. —, 517 P.2d 671 (1973).

JURISDICTION

The decision of the Supreme Court of the State of Oregon, Appendix A hereto, was filed on December 31, 1973, and this petition for a writ of certiorari was filed within 90 days of that date, pursuant to Rule 22 (1). This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Notwithstanding this Court's decision in *Harris v. New York*, 401 U.S. 222 (1971), does the Fifth Amendment, as applicable to the States through the Fourteenth Amendment, prohibit the use by the prosecution, for impeachment purposes, of statements made by a criminal defendant after the accused has been fully advised of his constitutional rights in accordance with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), and has expressed a desire to talk to an attorney?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment XIV, Section 1:

> "... [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. General Background

Hass was convicted upon trial by jury of a burglary in the first degree (Oregon Revised Statutes 164.225), which involved the stealing of a bicycle from the garage of a residence in Klamath Falls, Oregon. He appealed his conviction to the Oregon court of appeals, which decided three of the four issues raised adversely to Hass, but reversed the judgment on the ground that certain statements Hass made to a police officer were improperly used to impeach his trial testimony (See Appendix C hereto). Upon the State's petition for review, the Oregon supreme court affirmed the decision of the court of appeals in a 4-3 decision (See Appendix A hereto).

B. Facts Material to the Question Presented

On the day of the burglary, officer Osterholme of the Oregon State Police talked to Hass about the theft of the bicycle taken therein, after advising him of his *Miranda* rights (Tr. 45-46, 50-51). Hass admitted that he had taken two bicycles that day, and was not sure, at first, which bicycle Osterholme was talking about (Tr. 52). He stated that he had given one of the two bicycles back and agreed to show Osterholme where he had concealed the other (Tr. 53-54).

At some point on the trip to the spot where the second bicycle was concealed, Hass indicated that he realized he was in trouble and asked Osterholme if he could contact an attorney. Osterholme replied that Hass could telephone an attorney as soon as the two of them reached

the police station. In response to Hass's specific question, he also indicated that Hass did not have to continue to assist him in the investigation of this matter, but that he would like to "clear up" the matter at that time (Tr. 62-63).[1] After Osterholme recovered the second bicycle, Hass pointed out to him the homes from which the two bicycles had been taken (Tr. 67-68).

Upon hearing testimony concerning these events *in camera*, the trial court ruled that the things Hass did and said prior to the time he inquired about the availability of counsel were admissible in the State's case-in-chief, but that Hass's inquiry constituted a request for counsel and that anything he did or said thereafter was inadmissible (Tr. 70). Accordingly, Osterholme testified in the State's case-in-chief only that Hass had admitted that he and Patrick Lee had taken two bicycles on the day in question because he had needed money, that he had given one bicycle back, and that the second bicycle was also subsequently recovered (Tr. 72-73).

Hass then testified in his own behalf that he, Pat Lee, and Bill Walker had been driving around the area where the bicycles were taken, that Lee and Walker had taken the bicycles without his prior knowledge, that he did not know the exact location of the residences from which the bicycles had been taken, and that he knew only that the bicycles "came out of the area—you know, where I left

[1] On trial, Hass controverted officer Osterholme's testimony concerning the exact content of this conversation (See Tr. 66), but it is clear that the Oregon trial and appellate courts generally accepted Osterholme's testimony, as summarized above.

Pat and Bill off" (Tr. 95-96, 99, 109). In short, he admitted taking part in the subsequent concealment of the bicycles, and thus admitted his guilt of the crime of theft by receiving, but claimed that he had had no part in the burglary of which he was charged.

In rebuttal, the State recalled officer Osterholme, who testified, over Hass's objection, that after he had obtained the admissions about which he had previously testified, he had taken Hass to the area where the two bicycles had been stolen, and that Hass had pointed out the houses from which they had been taken (Tr. 111-112). The court then instructed the jury that this testimony was received only for purposes of impeachment (Tr. 125-126). On surrebuttal, Hass denied that he had pointed out the residences in question (Tr. 126-127).

C. Manner in Which the Federal Question Was Raised

The Federal question presented herein was originally raised by Hass, by his timely objection in the trial court to the admission of any statements which he made to officer Osterholme after he had expressed a desire to talk to an attorney.

> "[Defense counsel]: To save time I would agree that up to the point of Mr. Hass telling him that he wanted an attorney and that he was in a lot of trouble, that statement would be admissible but after that point I believe that all of the evidence incriminating this Defendant was illegally obtained and completely inadmissible." (Tr. 62).

The trial court initially ruled that such statements were obtained in violation of Hass's rights under *Miranda*

v. Arizona, 384 U.S. 436 (1966), and therefore inadmissible.

> "[THE COURT]: The Court sustains the objection to any of the admissions or statements of the Defendant from and after the time when he first stated that he wanted to see an attorney and the Court sustains the objection to the identification by the Defendant of the locations where the bicycle [*sic*] was taken unless the fact situation is other than you have indicated. . . ." (Tr. 70).

However, after Hass testified in a manner inconsistent with the statements previously excluded, the trial court ruled that, despite defendant's objection, the statements previously excluded were admissible for impeachment purposes, under *Harris v. New York*, 401 U.S. 222 (1971).

> "[The prosecutor]: Your Honor, on the State's case in chief, the State was not allowed to introduce evidence by Officer Osterholme that the Defendant had taken him to two residences where the bicycles were taken from and we would propose in our rebuttal case in view of the Defendant's testimony in Defendant's case that he didn't have knowledge of the two homes, we would propose to introduce evidence to the effect that he did take Officer Osterholme to these residences and I would site [*sic*] to the Court [*Harris v. New York*].
>
> * * *
>
> "[THE COURT]: The objection to the proposed rebuttal is over ruled but the Court is going to give the Jury the usual instruction that they can receive that evidence not as evidence—substitutive [*sic*] evidence but only bearing on the credibility of the Defendant as a witness. . . ." (Tr. 110).

On Hass's appeal to the Oregon court of appeals, this

ruling of the trial court was assigned as error in Hass's brief, as follows:

> "The trial court erred in allowing the state to use for impeachment purposes a statement elicited from the defendant by police interrogation which was inadmissible as part of the prosecution's case in chief because of failure to comply with constitutional requirements. . . ." (Appellant's Brief, at 19).

In its decision reversing Hass's conviction, the court of appeals indicated a belief that the evidence in question may have been admissible for impeachment purposes under *Harris v. New York, supra*, but held that it was bound by the contrary decision of the Oregon supreme court in *State v. Brewton*, 247 Or. 241, 422 P.2d 581, cert. denied 387 U.S. 943 (1967).[1] See Appendix C hereto.

The State sought rehearing in the court of appeals and discretionary review by the Oregon supreme court, on the grounds that in view of *Harris v. New York, State v. Brewton* was no longer a correct statement of the applicable rule of Federal constitutional law. The petition for rehearing read, in relevant part:

> ". . . [T]he Court erred in holding, at page 6 of its slip opinion, that *State v. Brewton* . . . is, and should remain the law of Oregon, notwithstanding the subsequent, contrary decision of the Supreme Court of the United States on precisely the same question of Federal constitutional law in *Harris v. New York*, . . . and that therefore, in-custody statements of a criminal defendant which are voluntary but for noncompliance with the requirements of *Miranda v. Arizona*, may not be used to impeach the defendant's

[1] For the convenience of the Court, this decision is reprinted as Appendix D hereto.

testimony in an Oregon criminal case, even though their use for that limited purpose is sanctioned by the Supreme Court of the United States." (Petition for Rehearing, at 1).

The point urged in the petition for review filed in the Oregon supreme court was stated as follows:

"(a) The Court of Appeals erred in holding, at page 6 of its slip opinion, that *State v. Brewton* . . . is, and should remain the law of Oregon, notwithstanding the subsequent, contrary decision of the Supreme Court of the United States on precisely the same question of Federal constitutional law in *Harris v. New York* . . . . Or, in other words:

"(b) The Court of Appeals erred in holding that in-custody statements of a criminal defendant which are voluntary but for non-compliance with the requirements of *Miranda v. Arizona* . . . may not be used to impeach the defendant's testimony in an Oregon criminal case, even though their use for that limited purpose is sanctioned by the Supreme Court of the United States." (Petition for Review, at 1-2).

In its 4-3 decision affirming the decision of the court of appeals, the Oregon supreme court distinguished the present case from both *Brewton* and *Harris*, and held that when full *Miranda* warnings are given, *Harris v. New York* is not applicable; and statements obtained without fully complying with the requirements of *Miranda* still may not be used, even for impeachment purposes. See Appendix A hereto.

The Federal question presented herein has thus been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

A. The Oregon supreme court has decided an important question of Federal constitutional law in a manner in conflict with the applicable decisions of this Court.

In *Harris v. New York*, 401 U.S. 222 (1971), this Court held that statements of a criminal defendant which would be admissible in the prosecution's case-in-chief, but for failure of the police to comply with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used to impeach the testimony of a criminal defendant who takes the stand and testifies in a manner contrary to his prior statements. This Court had previously held that a similar rule applies to the use, for impeachment purposes, of evidence seized in violation of the Fourth Amendment. *Walder v. United States*, 347 U.S. 62 (1954).

In failing to hold *Harris* controlling in the present case, the Oregon supreme court has drawn an artificial and meaningless distinction between one form of technical non-compliance with *Miranda* and another. Whether the police are to be faulted for failing to fully advise a suspect of his constitutional rights before questioning him, or whether they are to be faulted for continuing to question him after he expresses a desire to talk to counsel, the prophylactic purpose of the *Miranda* rule is adequately served by holding the evidence thus obtained inadmissible in the prosecution's case-in-chief. To go further, and to hold that evidence unusable for impeachment purposes as well, is to pervert the shield provided by *Miranda* into a license to use perjury by way of a defense, which is

precisely what *Harris* said is to be avoided. 401 U.S. at 226.

B. The Oregon supreme court has decided an important question of Federal constitutional law in a manner contrary to that of other courts, State and Federal.

As the dissenting opinion herein points out, the Supreme Court of North Carolina has held admissible, for impeachment purposes, statements which were obtained under essentially the same circumstances as are presented here. *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111 (1972). And at least two lower Federal courts have reached a similar result in pre-*Miranda* cases, with respect to statements obtained in violation of the requirements of *Escobedo v. Illinois*, 378 U.S. 478 (1964). *United States ex rel. Wright v. La Vallee*, 471 F.2d 123 (2d Cir. 1972); *United States ex rel. Padgett v. Russell*, 332 F. Supp. 41 (E.D. Pa. 1971). The conflict between these decisions and the decision herein merits resolution by this Court.

CONCLUSION

Whatever the future of the exclusionary rule may be with respect to the use of evidence in the prosecution's case-in-chief,[9] the Oregon supreme court's decision herein with respect to evidence used solely for the purpose of impeachment needlessly and improperly prevents Oregon prosecutors from using evidence for that purpose which is constitutionally permissible. Accordingly,

[9] We note in passing this Court's grant of certiorari in *Michigan v. Tucker*, — U.S. —, 94 S. Ct. 568 (No. 73-482, December 3, 1973), in which the continuing viability of *Miranda* is at least questioned.

and for the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Oregon herein.

Respectfully submitted,

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March 1974

APPENDIX A

OPINION OF OREGON SUPREME COURT

No. 10,270—December 31, 1973

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

STATE OF OREGON, *Petitioner, v.* WILLIAM ROBERT HAAS, whose true name is WILLIAM ROBERT HASS, *Respondent.*

On Review from the Court of Appeals.

Argued and submitted October 15, 1973.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for petitioner. With him on the briefs were Lee Johnson, Attorney General, and John W. Osburn, Solicitor General, Salem.

Sam A. McKeen, Klamath Falls, argued the cause and filed a brief for respondent.

Affirmed.

HOLMAN, J.

The defendant was convicted pursuant to a jury trial of the crime of first degree burglary. The Court of Appeals reversed and remanded for a new trial[1] because the trial court allowed information obtained by the police in violation of *Miranda v. Arizona*[2] to be used to impeach defendant's testimony. This court granted review for the sole purpose of determining whether information secured

[1] 97 Adv Sh 200, — Or App —, 510 P2d 852 (1973).
[2] 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 ALR 3d 974 (1966).

in violation of *Miranda* rules can be used for impeachment purposes under the circumstances which existed in this case.

Two bicycles were stolen from houses in the Moyina Heights district of Klamath Falls. One was taken from the Lehman residence and one was taken from the Jackson residence. Defendant was indicted for the burglary of the Lehman residence.

In an *in camera* hearing the arresting officer testified that after he gave the *Miranda* warnings, he questioned defendant about the Lehman theft and the defendant responded that two bicycles had been stolen and he did not know theft the officer was talking about. The officer then requested defendant to accompany him on a further investigation to clear up the matter and defendant agreed. However, on the way to the site of the thefts defendant had some misgivings and indicated he wanted to talk to a lawyer. The arresting officer responded that he could see a lawyer when they got back and proceeded with the investigation, during which defendant pointed out the two houses from which the bicycles had been taken. Pursuant to the disclosures made at the *in camera* hearing, the trial judge ruled that all references to defendant's activities after his request for a lawyer were barred from introduction in evidence.

Thereafter, defendant took the stand and testified that he had participated in concealing the bicycles when he knew they had been stolen, but he denied having known that they were going to be stolen and the houses from which they were taken. On rebuttal, over objection,

the arresting officer was permitted to testify for impeachment purposes that defendant had directed him to both the Lehman and Jackson houses and had identified them as being the ones from which bicycles had been taken.

The question of the use, for impeachment purposes, of information secured in violation of rules similar to those of *Miranda* was presented to this court in the case of *State v. Brewton*.[5] In that decision, in which the court was divided four to three, we held that information secured in violation of the rules set forth in *Escobedo v. Illinois*,[6] *Miranda's* precursor, could not be used for impeachment purposes. Since this court's decision in *Brewton*, the Supreme Court of the United States, in *Harris v. New York*,[7] has faced a similar problem in relation to *Miranda* rules and has reached a decision contrary to *Brewton* based upon reasoning similar to the dissenting opinions in *Brewton*. The rationale of the *Harris* opinion was that while information secured in violation of the *Miranda* rules may not be used to incriminate a defendant, neither should such violation be used as a shield for or an invitation to perjury; and, assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.[8]

[5] 247 Or 241, 422 P2d 581, *cert. denied*, 387 US 943, 87 S Ct 2074, 18 L Ed 2d 1328 (1967).

[6] 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964).

[7] 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971).

[8] *Id.* at 225-26.

It was for the purpose of deciding whether we wished to overrule *Brewton* that we took review of this case. However, we now find that it is not necessary to make that determination in deciding this case because whether the reasoning of *Brewton* or of *Harris* is used, the opinion of the Court of Appeals must be affirmed and the defendant's conviction reversed.

In *Brewton* and *Harris* either insufficient or no warnings were given. In those situations, before questioning begins, the police do not know whether or not they will get incriminating information from the defendant if they give the required warnings. Experience has taught there is a good possibility they will.[9] Therefore, the argument can be made that in such situations it appears likely that police will not take the chance of losing incriminating evidence for their case in chief by not goving adequate warnngs. The change of being able, without sufficient warnings, to use what information they get for impeachment affords insufficient advantage to induce the police to endanger their chance of making a case at all. Therefore, in such circumstances the prophylactic measure of total exclusion may not be necessary because police will not be induced by the more limited use to fail to give the proper warnings.

However, such is not this case. The defendant here was given proper warnings and took them at their word and asked for a lawyer.[10] The police then knew they

[9] E. Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv L Rev 42 (1968).

[10] The opinion in *Harris* makes no mention of any request by Harris for a lawyer, and the opinion is interpreted as if there was none. However, see comment, 80 Yale L J 1198, 1200 (1971), which indicates that he may have asked to see a lawyer but he would be satisfied to see one "tomorrow."

would most likely get nothing further from defendant if he consulted a lawyer. Therefore, they had nothing to lose and something to gain by violating *Miranda* if the State is permitted to use such information as was secured by continued interrogation for impeachment purposes. In such a situation, there is no pressure whatsoever to obtain compliance and the prophylactic exclusion of the evidence as dictated by *Miranda, Escobedo,* and *Neely*[1] is still required.[2]

The opinion of the Court of Appeals is affirmed.

HOWELL, J., dissenting.

I dissent. I do not see any difference between the situation in this case and one where the police secure information given voluntarily to them but without a prior *Miranda* warning. In my opinion, the court is presented with a choice between the prophylactic effect of punishing impermissible police conduct by prohibiting the admission of any evidence whether substantive or impeachment, or a license to the defendant to commit perjury. The choice made by the United States Supreme Court was aptly expressed by Mr. Chief Justice Burger in *Harris v. New York,* 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971):

> "* * * The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.
>
> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. * * *
>
> "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. * * *" 401 US at 225, 226.

No *Miranda* warning was given in *Harris.* In the instant case, the warning was given, but apparently the interrogation continued after the defendant stated that he wanted to see a lawyer. The result should be the same as in *Harris:* the state is precluded from offering that evidence as part of its case in chief, and the defendant is precluded from using the *Miranda* shield to commit perjury.

In *United States ex rel. Wright v. LaVallee,* 471 F2d 123 (2nd Cir 1972), the defendant contended that a statement elicited by a police officer after defendant had requested and been denied counsel was inadmissible as a violation of *Escobedo v. Illinois,* 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964). The court held that as the statement was used only on cross examination for impeachment purposes it was admissible under the *Harris* decision.

In *United States ex rel. Padgett v. Russell,* 332 F Supp 41 (DC ED Pa 1971), the court held that even if the in-

[1] State v. Neely, 239 Or 487, 395 P2d 557, 398 P2d 482 (1965).

[2] *See* United States ex rel Wright v. LaVallee, 471 F2d 123 (2d Cir 1972), for a contrary result though the rationale applied by us in the present opinion was not discussed.

terrogation of the defendant violated *Escobedo* standards for being obtained in the absence of counsel, the admission of the evidence for impeachment purposes did not violate constitutional standards. The court stated:

> "* * * [A]ssuming that the interrogation was conducted under circumstances violative of *Escobedo*, Harris v. New York, * * * is clearly dispositive of petitioner's claim. *Harris* limited *Miranda*, and by necessary implication *Escobedo*, in holding that a statement obtained through improper custodial interrogation could be introduced to impeach the credibility of the defendant, though not to establish the prosecution's case in chief. * * *"

The same result was reached by the Supreme Court of North Carolina in *State v. Bryant*, 280 NC 551, 187 SE2d 111 (1972), where the defendant had been given the *Miranda* warning, but had not waived his right to counsel. The court found that *Harris v. New York*, supra, permitted the statements to be used for impeachment purposes.

I would overrule our decision in *State v. Brewton*, 247 Or 241, 422 P2d 581 (1967), and reverse.

Tongue, J., and Bryson, J., join in this dissent.

APPENDIX B

JUDGMENT OF OREGON SUPREME COURT

STATE OF OREGON

SUPREME COURT

Mandate

STATE OF OREGON,	)	
	)	Appeal from
Petitioner	)	KLAMATH
v.	)	County
	)	No. 72 124 C
WILLIAM ROBERT HAAS, whose true name is William Robert Hass,	)	
	)	On Review
	)	from Court
Respondent	)	of Appeals

This cause on October 15, 1973, having been duly argued and submitted upon questions arising on petition for review from the Court of Appeals, and the court having fully considered said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS ORDERED and ADJUDGED that the decision of the Court of Appeals is affirmed.

IT FURTHER IS ORDERED that respondent recover from petitioner his costs and disbursements in this court taxed at $15.00.

IT FURTHER IS ORDERED that this cause is remanded to the Court of Appeals for entry of order in accordance herewith.

ENTERED at Salem, Oregon this 31st day of December, 1973.

APPENDIX C

OPINION OF COURT OF APPEALS

No. 1676—May 21, 1973

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, *Respondent, v.* WILLIAM ROBERT HAAS, whose true name is WILLIAM ROBERT HASS (No. 72-124-C), *Appellant.*

Appeal from Circuit Court, Klamath County.

Donald A. W. Piper, Judge.

Argued and submitted May 7, 1973.

Sam A. McKeen, Klamath Falls, argued the cause and filed the brief for appellant.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and John W. Osburn, Solicitor General, Salem.

Before Schwab, Chief Judge, and Langtry and Thornton, Judges.

Reversed and remanded.

LANGTRY, J.

Defendant was convicted by a jury of first degree burglary (ORS 164.225) and appeals the resulting sentence of $250 fine and two years' probation. Evidence was that two bicycles had been stolen, one from the garage of the Lehman house and one from the garage of

the Jackson house in the same area (Moyina Heights) of Klamath Falls in August 1972. Defendant was indicted for the burglary from the Lehman residence. He was not charged with the other burglary.

Mr. Lehman and his son testified that they had witnessed someone riding the bicycle out of their driveway and gave chase to a vehicle from which they eventually recovered the bicycle. They identified the defendant as the driver of the vehicle, and his only companion as the person who had taken the bicycle.

In camera, Officer Osterholme testified that after *Miranda* warnings,[1] he had questioned defendant about the Lehman theft. Defendant in substance replied that he had stolen two bicycles that afternoon and did not know which theft the officer was talking about. Defendant then showed him where the second bicycle was concealed and pointed out the two houses from which the bicycles were taken. Prior to locating the second bicycle but after his initial statement to the officer, defendant had asked if he could phone his lawyer. The court, on motion of the defendant, ruled that all reference to defendant's activities after his request for a lawyer would not be admitted for failure to comply with the *Miranda* rules.

Officer Osterholme then testified to the jury as to the statement made by defendant that he had stolen two bicycles that day. He also testified that he had recovered a bicycle and had taken it to a Mr. White who identified it as belonging to his son, Roy. Two members of the

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[1] Miranda v. Arizona, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974 (1966).

Jackson family testified that a bicycle belonging to Roy White had been kept in their garage. Mr. Jackson testified he was unaware the bicycle had been stolen until a state police officer had brought it to his house to be identified.

Defendant took the stand and testified that he had had no prior knowledge of the burglaries, which had actually been committed by two other people who were riding around with him in his vehicle. But he said he had participated in the attempt to conceal the bicycles from their owners. He denied knowing from which houses the bicycles had been taken.

On rebuttal Officer Osterhoime was permitted to testify for impeachment purposes only that defendant had taken him to and had identified the two houses.

Defendant's assignments of error raise four issues. (1). Is an attached garage part of a dwelling so that burglary from a garage would be first degree burglary? (2). Must an indictment for burglary state the crime intended to be committed inside of the entered building? (3). Was the evidence of the second burglary admissible? (4). May evidence obtained in violation of the *Miranda* rules be admitted for the limited purpose of impeaching the credibility of a witness?

(1). Defendant bases his argument that an attached garage is not a dwelling on the contention that the 1971 legislature redefined "dwelling" and defined "building" for the first time in such a manner that such a garage would no longer be included as a dwelling.[1]

[1] Former ORS 164.210 (2) (repealed 1971) provided:

"'Dwelling house' includes any building of which any part has

(Continued on page 23)

We do not reach this question of statutory construction because the record shows that this garage was neither a separate structure nor a separate unit. The garage was under the same roof as the rest of the dwelling and was surrounded on three sides by rooms occupied by the family. As such it was structurally no different than any other room in the house. *Cf. State v. Burns*, 94 Adv Sh 1124, 9 Or App 392, 495 P2d 1240 (1972).

(2). Defendant demurred to the indictment during the course of the trial on the ground that the indictment failed to state a crime.[2]

The general rule is that an indictment in the language of the statute creating the offense is sufficient as long as it alleges all of the elements of the crime that must be proven for conviction. *State v. Smith*, 182 Or 497, 188 P2d 998 (1948); *State v. Jim/White*, 96 Adv Sh 1583, — Or App —, 508 P2d 462 (1973).

(Continued from page 22)

usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such building."

ORS 164.205 (1) and (2) now read:

"(1) 'Building,' in addition to its ordinary meaning, includes any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, including, but not limited to, separate apartments, offices or rented rooms, each unit is, in addition to being a part of such building, a separate building.

"(2) 'Dwelling' means a building which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present."

[2] We consider this demurrer to be based on ORS 135.630 (4) which provides for a demurrer on the ground "[t]he facts stated do not constitute a crime • • •."

We do not consider here what the proper ruling would have been had a demurrer based on ORS 135.630 (2) been made at the proper time, such a demurrer being equivalent to a motion to make more definite and certain.

The indictment in this case is in the language of the statute[3] and is therefore sufficient to state the crime charge. *State v. Jim/White*, supra, 96 Adv Sh at 1599.

(3). Was evidence of the second burglary admissible? The general rule is that evidence of the commission of other crimes by the defendant is inadmissible. *State v. Lehmann*, 6 Or App 600, 488 P2d 1383 (1971); *State v. Woolard*, 2 Or App 446, 467 P2d 652, Sup Ct *review denied* (1970), *cert denied* 406 US 972 (1972). But such evidence is admissible where it shows "'"* * * a common scheme or plan embracing the commission of two or more crimes, so related to each other that the proof of one tends to establish the others * * *."'" *State v. Woolard*, supra, at 449. The test is whether the relevance of the evidence outweighs its prejudicial effect. *State v. Spunaugle*, 96 Adv Sh 246, 249, — Or App —, 504 P2d 756 (1972); *State v. Lehmann*, supra. Defendant contends that the second burglary was never connected to the defendant in the state's case-in-chief. Therefore the relevance of the evidence to the crime charged was never shown and thus there was nothing to outweigh the prejudicial effect.

While the state was not permitted to show a direct link between the defendant and the second crime, because the evidence of defendant's locating the second bicycle was excluded and because the Jacksons could not state with certainty that the bicycle had been stolen

[3] ORS 164.215 (1) provides:

"A person commits the crime of burglary * * * if he enters or remains unlawfully in a building with intent to commit a crime therein." (Emphasis supplied.)

on the same day that a bicycle was taken from the Lehman residence, we feel that the evidence was sufficiently relevant to permit its introduction. This is so because the state did show that the defendant had volunteered that he was involved in two bicycle thefts inthe same area. The evidence showed the burglary at the Jackson residence had definitely occurred within a few days of the crime charged and quite possibly on the same day. The state need not prove beyond a reasonable doubt that defendant committed the second crime in order for evidence thereof to be admitted. *Cf. State v. Johnson*, 96 Adv Sh 1318, — Or App —, 507 P2d 828 (1973).

(4). This question stems from the allowance by the trial judge of the admission of evidence obtained from defendant in violation of the *Miranda* rules for the limited purpose of impeaching defendant's credibility. In *Harris v. New York*, 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971), the court held such evidence if otherwise "trustworthy" was admissible for the limited purpose of impeaching the credibility of a defendant who took the stand. In *State v. Brewton*, 247 Or 241, 422 P2d 581, *cert denied* 387 US 943 (1967), the Oregon Supreme Court held such evidence was not admissible for impeachment purposes. We are bound by the decision of our own Supreme Court in this area. *State v. Evans*, 2 Or App 441, 468 P2d 657 (1970), *reversed* 258 Or 437, 483 P2d 1300 (1971).

Reversed and remanded.

APPENDIX D

OPINION IN STATE v. BREWTON, 247 OR. 241, 422 P.2d 581 (1967)

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, *Respondent*, *v.* FRANK LEROY BREWTON, *Appellant*.

* * *

In Banc

Appeal from Circuit Court, Multnomah County.

J. J. Murchison, Judge.

William J. Sundstrom, Portland, argued the cause and filed a brief for appellant, and appellant filed briefs in propria persona.

Jacob B. Tanzer, Deputy District Attorney, Portland, argued the cause for respondent. With him on the brief was George Van Hoomissen, District Attorney, Portland.

Hardy Myers, Jr., Portland, filed a brief as amicus curiae on behalf of the American Civil Liberties Union of Oregon.

Before McAllister, Chief Justice, and Perry, Sloan, O'Connell, Goodwin, Denecke and Holman, Justices.

Reversed and remanded.

GOODWIN, J.

This is an appeal from a conviction of first-degree murder. Background facts beyond those essential for this appeal are substantially outlined in *State v. Brewton*, 220 Or 266, 344 P2d 744 (1959), and in 238 Or 590, 395 P2d 874 (1964).

The only issue here is whether it was error to permit

the state to impeach the defendant with statements that were elicited from him by police interrogation which, the state concedes, rendered the statements inadmissible as a part of its case in chief. The interrogation, which took place in November 1957, was not preceded by the warnings and advice concerning Fifth and Sixth Amendment protection that are now required by *State v. Neely*, 239 Or 487, 503-504, 395 P2d 557, 398 P2d 482, 486-487 (1965), and by subsequent decisions of this court.

After the state had rested without offering Brewton's admissions in evidence, Brewton took the stand in his own defense. He told a story which, if believed, might have been consistent with his theory that he was not a principal in the crime. Brewton's courtroom story, however, was wholly inconsistent with the statements he had given the police shortly after his arrest.

After hearing the defendant's testimony, the state offered his police-station admissions for the limited purposes of impeachment, and they were so received over a timely objection. (The trial court earlier had held a hearing upon the issue of voluntariness, and had found as a fact that the admissions which Brewton made to the police were voluntary, at least in the sense that they were not coerced in any manner. The statements fell under the exclusionary rule only because they did not meet the constitutional requirements of *State v. Neely*.)

A number of state and federal decisions tend to support the trial court in receiving such evidence for impeachment. *Tate v. United States*, 283 F2d 377 (DC Cir 1960), deals with the conflict between the *McNabb-*

Mallory exclusionary rule and a desire for truth provable by trustworthy evidence. The case holds that when one set of these interests must yield it is better that the exclusionary rule yield than to stand upon that rule and invite perjury. See also *State v. McClung,* 66 Wash2d 654, 404 P2d 460 (1965), cert. denied, 384 US 1013, 86 S Ct 1967, 16 L Ed 2d 1031 (1966). It might be noted that the federal procedural rationale for the *McNabb-Mallory* rule has recently been replaced by constitutional rules now binding on the states. *Escobedo v. Illinois,* 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964).

This court has not been faced with the identical question decided in *Tate v. United States,* but *State v. Smith,* 242 Or 223, 408 P2d 942 (1965), is instructive. In *State v. Smith,* we held that a confession not shown to be voluntary was just as untrustworthy when used to prove the defendant a liar as when used to prove that he committed the crime for which he was on trial. It has been pointed out in the case at bar that Brewton's admissions to the police were voluntary ,at least in the pre-*Escobedo* sense that they were not obtained by threats or promises.

While an argument can be made that "voluntary" unconstitutional confessions can be distinguished from "involuntary" unconstitutional confessions, solely for the purposes of impeachment, this dichotomy does not appeal to us as constitutionally meaningful.

Since the decision in *State v. Neely,* supra, this court has consistently applied the exclusionary rule when the facts established interrogation which was held to violate the constitutional rights of the defendant as interpreted

in *State v. Neely.* See, e.g., *State v. Ervin,* 241 Or 475, 406 P2d 901 (1965); *State v. Keller,* 240 Or 442, 402 P2d 521 (1965). In these cases we have recognized the inherently coercive chcaracter of police interrogation of a suspect in custody who has not been advised of his rights. Even in cases in which we have affirmed convictions following custodial interrogation, we have done so only upon express findings supported by credible evidence that there was an intelligent waiver of rights. See, e.g., *State v. Atherton,* 242 Or 621, 410 P2d 208, cert. denied 384 US 1025, 86 S Ct 1982, 16 L Ed 2d 1030 (1966).

Whether or not *Miranda v. Arizona,* 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 714 (1966) is binding upon Oregon courts with reference to trials concluded before the *Miranda* decision was published, we are satisfied that any attempt in the future to restrict the exclusionary rule to the state's case in chief would be inconsistent with the constitutional principles which are inherent in the *Miranda* case as well as in our own earlier decision in *Neely.*

The United States Supreme Court under the Fourteenth Amendment has attempted to achieve uniformity between the state and federal systems in the interpretation of Fourth, Fifth and Sixth Amendment rights. It has done so upon the assumption that the exclusionary rule is a necessary procedural device to implement the substantive rights written into the Fourth, Fifth, and Sixth Amendments. This court, accordingly, has adopted the assumption that without the procedural aid of the exclusionary rule those substantive rights would

be empty promises instead of constitutional guarantees. We so held in *State v. Neely*, and we have followed that view in cases coming before us since *Neely*.

If we should today adopt a restrictive application of the exclusionary rule, the result could be a major step backward. This court would in effect be saying to the overzealous that police officers will be free in the future to interrogate suspects secretly, at arms length, without counsel, and without advice, so long as they use means consistent with threat-or-promise voluntariness, and so long as they understand that they may file the information only for use to keep the defendant honest. Thus the police could, at their option, take a calculated risk: By giving up the possibility of using the suspect's statements in the state's case, they could obtain by unconstitutional means and store away evidence to use if the defendant should elect upon trial to take the stand. As commendable as it may be to prevent perjury, the price of such prevention could be to keep defendants off the stand entirely. In some cases, the temptation to silence a suspect of dubious probity might very well outweigh the desire to conduct a constitutionally valid interrogation. We have concluded that to introduce such a rule could undo much of the recent progress that has been made in upgrading police methods to preserve the rights guaranteed under the Fifth and Sixth Amendments, and would be inconsistent with the trend of our recent decisions.

We are also unable to follow the "middle ground" suggested in *Tate v. United States*, supra, to the effect

that if a defendant merely takes the stand and denies his part in the crime he may not be impeached by the fruits of unconstitutional interrogation, but if he testifies about collateral matters he may be so impeached. Such a rule would be virtually unworkable. The usual reason a defendant chooses to take the stand is to give the jury a comprehensive statement of his side of the story. Any story that would be responsive to the questions raised by the state's case would tend to open up collateral matters and would invite impeachment if the tools of impeachment were at hand. The state should be free to impeach, but it ought to come by its impeachment as legally as it accumulates its other evidence.

If the choice is to exclude all illegally obtained evidence or to silence the defendant as a witness, it is better to exclude the illegal evidence. As we have said before, circumvention of constitutional liberties is not to be encouraged by permitting illegally obtained evidence to come in "through the back door." *State of Oregon v. Goodwin*, 207 Or 642, 645, 298 P2d 1024 (1956).

Other assignments of error have been briefed and argued, but since they present questions that are not likely to arise upon another trial they need not be discussed at this time.

The case is reversed and remanded to the trial court for a new trial.

PERRY, J., dissenting.

I am of the opinion that neither *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L ed 2d 694, nor any of the

opinions of this court, compel the reasoning or result approved by the majority in this case.

Miranda v. Arizona, supra, and *State v. Neely*, 239 Or 487, 395 P2d 557, 398 P2d 482, deal with the use of confessons for the purpose of providing probative facts required to establish the necessary elements of the crime with which a defendant is charged. These cases are thus grounded upon the proposition set forth in the Fifth Amendment of the Constitution of the United States—that no man shall be compelled to give incriminating evidence against himself.

Incriminating evidence is evidence which tends to show that the defendant did certain acts from which a trier of fact could conclude that the defendant committed the crime charged. The purpose of the prophylactic rule of exclusion then is to prevent the introduction of statements made by a defendant which tend to establish his guilty acts as matters of fact.

The introduction of statements made by a defendant by way of impeachment to test the credibility of his story of his innocence serves no such purpose.

A defendant's statements and his confession thus used have no probative value to prove the crime charged, and the trial court will so instruct the jury.

The trial judge, after an extensive hearing, held that the confession of this defendant was voluntary, but that it could not be used as probative evidence because it violated the absolutism rules of procedure laid down by a majority of the Supreme Court of the United States

to curb what they believed were unwarranted police practices.

State v. Smith, 242 Or 223, 408 P2d 942, permits the introduction of statements for impeachment purposes if found voluntary.

In *Walder v. United States*, 347 US 62, 65, 74 S Ct 354, 98 L ed 503 (1954), in dealing with an exclusionary rule that prevented the introduction of evidence as proof of the crime charged, the Supreme Court stated:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide him with a shield against contradiction of his untruths. * * *"

I know of no reason why this court should go beyond the requirements of the Supreme Court of the United States in announcing a rule that would enlarge the exclusionary rules of the Supreme Court to a point not compatible with the purposes sought to be served by the Fifth Amendment.

Based upon the rationale of *Walder v. US*, supra, followed in *Tate v. US*, 283 F2d 377 (DC Cir 1960), and *State v. McClung*, 66 Wash2d 654, 404 P2d 460 (1965), I would affirm the judgment.

HOLMAN, J.,dissenting.

The issue is whether the prophylactic purposes of *Escobedo*[2] and *Neely*[3] will be negated if admissions and confessions obtained by non-compliance with those cases are permitted to be used for impeachment of de-

fendants. I am of the opinion that the inability of the prosecution to use such admissions and confessions in its case in chief for incriminating purposes will be sufficient to obtain compliance with *Escobedo* and *Neely* requirements by the police. If this is so there is no valid reason for not permitting the use for impeachment purposes of evidence that everyone concedes is both relevant and truthful.

O'Connell, J., joins in this dissent.

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① Escobedo v. State of Illinois, 378 US 478, 84S Ct 1758, 12 L ed2d 977 (1964).

④ State v. Neely, 239 Or 487, 395 P2d 557, 398 P2d 482 (1965).

Supreme Court, U. S.
NOV 1 0 1974

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITION FOR A WRIT OF CERTIORARI FILED MARCH 29, 1974
CERTIORARI GRANTED OCTOBER 15, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Sept. 6, 1972—Indictment returned into Circuit Court for Klamath County, Oregon, accusing Hass of burglary in the first degree.

Sept. 13, 1972—Hass arraigned on indictment and entered plea of not guilty.

Oct. 6, 1972—Hass's trial by jury began.

Oct. 9, 1972—Verdict of guilty returned.

Oct. 16, 1972—Judgment order entered, sentencing Hass to pay $250 fine and placing him on probation for two years.

Oct. 26, 1972—Hass's notice of appeal filed.

May 21, 1973—Opinion of Oregon Court of Appeals entered, reversing circuit court.

May 25, 1973—State's petition for rehearing filed.

May 30, 1973—Petition for rehearing denied.

June 20, 1973—State's petition for review filed in Oregon Supreme Court.

Sept. 5, 1973—Petition for review allowed.

Dec. 31, 1973—Opinion of Oregon Supreme Court entered, affirming Court of Appeals.

Mar. 29, 1974—State's petition for certiorari filed.

Oct. 15, 1974—Certiorari granted.

INDICTMENT

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF KLAMATH

THE STATE OF OREGON	)	
	)	INDICTMENT
v.	)	
	)	72-124 C
WILLIAM ROBERT HAAS [*sic*]	)	

William Robert Haas [*sic*] is accused by the Grand Jury of the County of Klamath by this indictment of the crime of burglary in the first degree committed as follows:

The said William Robert Haas [*sic*] on or about the 4 [*sic*] day of August A.D. 1972 in the said County of Klamath and State of Oregon, then and there being, did knowingly, unlawfully and feloniously enter a building, to-wit: a dwelling located at 1328 Carlson Drive, Klamath Falls, Oregon, with the intent to commit a crime therein, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon. (O.R.S. 164.225).

Dated at Klamath Falls in the County aforesaid, this 6 [*sic*] day of September A.D. 1972.

[Signatures, indorsements, and names of witnesses examined before Grand Jury omitted in printing.]

TRANSCRIPT OF TRIAL
(excerpts)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF KLAMATH

THE STATE OF OREGON, Plaintiff,	)	
	)	
vs.	)	No. 72-124-C
	)	
WILLIAM ROBERT HASS, Defendant.	)	

[October 6, 1972]

* * * * *

[45]

BJORN OSTERHOLME

was thereupon produced as a Witness in behalf of the State of Oregon, and having been first duly sworn on oath, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. CRANE:

Q. Would you state your name and address?

A. Bjorn Osterholme, 6536 Climax Avenue, Klamath Falls, Oregon.

Q. Where are you employed?

A. By the State Police.

Q. How long have you been so employed?

A. Approximately two and a half years.

MR. McKEEN: Your Honor, might I ask a question in aid of objection?

THE COURT: Yes.

MR. McKEEN: Q. Officer, in your hand you have a paper notebook, a book, some papers, is that correct?

A. Yes, correct.

Q. And is that your notebook that contains the original notes of this case?

A. Yes.

Q. And in those papers is the report that you made for this case?

A. Yes.

Q. And have you read those in preparation for your testimony

[46]

today?

A. Yes.

Q. And your testimony today is going to be partly based upon those notes?

A. Yes.

MR. McKEEN: I would ask that they be produced under the rules of the Foster case [*i.e.*, *State v. Foster*, 242 Or. 101, 407 P.2d 901 (1965).].

MR. CRANE: That rule applies at the time of cross examination.

THE COURT: Council [*sic*] will be allowed to see them.

MR. CRANE: I have no objection to that.

THE COURT: The request at this point is denied.

MR. CRANE: Q. Officer Osterholme, referring you to August 3, 1972, were you given a license number—

MR. McKEEN: I would object to this Witness using those notes, no foundation has been laid for the use of past memory recorded or refreshing his recollection.

MR. CRANE: I can lay that foundation.

THE COURT: Proceed.

MR. CRANE: Q. Officer, do you have a complete memory of all of the events that occurred that evening?

A. No, sir.

Q. Referring to your notebook, did you make those notes at the time the events occurred?

MR. McKEEN: I would with draw [*sic*] my objection.

[47]

MR. CRANE: Q. Did you make those at the time the events occurred or close to the time that the events occurred?

A. Yes.

Q. Alright, would those notes aid you in giving us your accurate description of the events as they occurred that evening?

A. Yes, they would.

MR. McKEEN: Might I ask a question in aid of an objection, Your Honor?

THE COURT: Yes.

MR. McKEEN: Q. Officer, you testified that you have gone over these and read them for the purpose of your testimony today, is that true?

A. Yes.

Q. And how many pages does it consist of in this case in your notebook?

A. I don't know for sure.

Q. How many reports do you have?

A. I have two reports.

Q. Are you saying that after you studied the reports you can't testify substantially accurate as to what happened without looking at them on the Witness stand, that your memory is not such after you have studied your notes so that you can testify without looking at them?

A. I didn't study my notes, I just briefly glanced over them

[48]

to refresh my memory.

Q. Other than the license plate number and that type of thing, wouldn't you be able to give us your testimony without the use of your notes?

A. I think my notes would help in my testimony.

Q. Then, your [*sic*] saying that your memory is such that even after reading your notes that you couldn't testify as to what happen [*sic*] in this case without having them in front of you?

A. No, sir.

MR. McKEEN: I would object to the using of the notes.

MR. CRANE: Mr. McKeen has already granted permission by looking at the notes and looking at the report that was made by Officer Osterholme. Obviously the idea is to get him to testify without refreshing his memory and then trying to trip him up from his other notes. I think that he ought to be able to use his notes.

MR. McKEEN: I believe that comment of Council [*sic*] is unfair and I would ask that it be stricken.

THE COURT: That portion of the statement about "tripping up" is stricken and the Jury is instructed to disregard it. The Court holds that the foundation has been laid for Officer Osterholme to use his notes and at this point Council [*sic*] is permitted to view them if he wishes.

MR. McKEEN: I do, Your Honor.

THE COURT: Very well.

[49]

(Whereupon the notes were handed to Council [*sic*] for his inspection)

MR. CRANE: Q. Officer, without going into the license number and so on, did you receive a license number that you were to trace?

A. Yes.

Q. And did you through various steps trace that too [*sic*] William Hass?

A. Yes.

Q. Okay, did you go to Mr. Hass's residence?

A. Yes, I did.

Q. And where was that?

A. I'll have to refresh my memory from my notes here, 4500 Green Springs Drive, Klamath Falls, Oregon.

Q. Did you observe a Volkswagen bus there?

A. Yes, I did.

Q. Could you describe the bus generally for us?

A. Yes, this particular Volkswagen was rather unique, light blue Volkswagen delivery—

Q. Could you speak up?

A. Yes, this Volkswagen bus is rather unique, it looked like a Volkswagen pickup, the top of it was cut off with a cutting torch, the top of the cab portion.

Q. Did you contact Mr. Haas at that residence?

A. Yes, I did.

[50]

MR. CRANE: Your Honor, at this time I think we should have a hearing out of the presence of the Jury.

MR. McKEEN: I would agree, Your Honor.

THE COURT: Very well. The Jury may retire to the Jury room.

(Out of the presence of the Jury)

MR. McKEEN: I have some instructions, Your Honor.

THE COURT: Very well.

MR. McKEEN: I would serve them on the Court and on Council [*sic*].

MR. CRANE: I have some also, Your Honor.

THE COURT: Thank you.

MR. CRANE: Q. Officer Osterholme, when you contacted the Defendant did you advise him of his rights?

A. Yes, I did.

Q. And did you ask him any questions prior to that?

A. The first thing I did was I advised him of his rights.

Q. Did you use a form in doing that?

A. Yes, this is our Oregon State Police form 45, advice of rights.

Q. Do you have that form that you used when you talked to the Defendant?

A. Yes.

Q. Alright, would you describe the procedure that you used in advising him of his rights?

A. I read the front of form 45 and instructed Mr. Hass to

[51]

answer the questions if he understood and no if he did not.

Q. Would you then use the form, would you tell us what you told him and then what he responded?

A. Yes, I said "it's my duty as a police officer to inform you of your rights, you have the right to remain silent, do you understand this," and Mr. Hass replied "yes."

Q. What did you do to the form when he indicated that?

A. I wrote down his answer.

Q. Go ahead?

A. "Anything you say can be used against you in a court of law, do you understand that" and Mr. Hass answered "yes." "You have the right to talk to a lawyer and have him present while your [*sic*] being questioned, do you understand that," and Mr. Hass answered "yes." "If you do give a statement you can stop talking at anytime you wish, do you understand that," and Mr. Hass answered "yes." "Having these rights in mind do you wish to talk to me now," and Mr. Hass answered "yes."

Q. Did you tell Mr. Hass why you were there?

A. After I informed him of his rights, yes.

Q. What did you tell him?

A. I told him that I was investigating the theft of a bicycle.

Q. And what did he say?

A. Oh, we had a brief conversation there in which there was some confusion as to what bicycle I was talking about and

[52]

then I asked him if he had stolen more than one and we had a conversation back and forth about this at which point he admitted that he had taken two that day and didn't know which one I was talking about.

Q. Okay, can you read his exact words, did he say that he had taken them?

A. Yes, he did, he preliminarily indicated he was the one who had taken them.

Q. Did he indicate anyone else had been with him?

A. Yes, during that conversation he also admitted having another person with him.

Q. Did he tell you who that was?

A. Not at that time, he stated the other person was in the house.

Q. Now, you say that he said he had taken two bicycles?

A. Yes.

Q. Did he tell you where they had been taken from?

A. He didn't know the exact addresses.

Q. Did he say anything else during this conversation that you recall?

A. Yes, I asked him why he had taken the bicycles and he said that he needed money and I asked him if he was working and his reply was "no," that he had quit his job because it was too hard on him and that he was now broke and needed money to eat and that's why he had taken the

[53]

bicycles.

Q. Anything else that he said that you can recall before you went into the house?

A. He informed me that he had given one of the

bicycles back and that the other one was at a place where it had been left by Mr. Hass and the other individual in the house.

Q. Did he tell you where that was?

A. Not at that time, no.

Q. Anything else that you can recall?

A. No, sir.

Q. Then you went in the house?

A. Yes.

Q. And did he point out someone in the house?

A. I don't remember if he pointed him out or not, I remember pointing toward one individual and asking him if that was the one that was with him and he said "yes," and the person I was pointing too [*sic*] was Patrick Michael Lee.

Q. While you were in the house did Mr. Hass tell you anything else about the incident?

A. No, sir.

Q. Okay, did you leave the residence then with Mr. Hass and Mr. Lee?

A. Yes.

Q. And where did you go?

A. I went to Washburn Way near Joe Wright Road, the intersect-

[54]

ion of Joe Wright Road and then—near Route 1 Box 136 Washburn Way and Mr. Hass

pointed out a place in the brush where the bicycle was and we did recover the bicycle.

Q. Did you pick up the bicycle and take it with you?

A. No.

Q. Did Mr. Hass say anything during—in the car about what—about the incident involved?

A. At one point he said that he was in a lot of trouble and he would like to phone his attorney at which time I told him he could phone his attorney as soon as we got to the office, that we would provide a phone for him.

MR. CRANE: That's all I have.

CROSS EXAMINATION

MY MR. McKEEN:

Q. Officer, had this boy shown you the bicycle yet when he told you that he was in a lot of trouble and would like to call his attorney?

A. No, he hadn't—

THE COURT: Excuse me, the issue before the Court in the absence of the Jury is going to be the admissibility of the alledged [*sic*] statements, is that what your cross examination is about?

MR. McKEEN: Mr. Crane brought up evidence of another crime that involves illegal search and I had no reason to file any preliminary motions involving that bicycle

[55]

because it was not connected with this crime but I think the evidence will disclose that

that bicycle was picked up after this Defendant told the police officer that he wanted to contact an attorney and after he was advised that he couldn't do so until he got back to the station and that he then gave a statement that caused this officer to find that bicycle and I believe that I have a right to raise that question and I have objected to this other testimony as fruits of an unlawful search.

THE COURT: Very well. Proceed.

MR. McKEEN: Q. Had he shown you where the bicycle was when he told you that he wanted to talk to an attorney?

A. No, sir.

Q. And after he told you that he wanted to talk to an attorney you still caused him to show you where the bicycle was, correct?

A. No, sir.

Q. Okay, what happened?

A. Mr. Hass volunteered to go ahead and show me where the bicycle was.

Q. He told you that he wanted to talk to his attorney and you told him that he could do that when you got back to the station and then you went ahead and he showed you where the bicycle was, correct?

A. No, sir.

[56]

Q. What did I say that is wrong?

A. I explained to him that a phone would be provided when we got to the station.

Q. When you got to the station?

A. Yes.

Q. So, you continued with him—isn't it true that after you told him this that you got on the wrong road and that you had to turn around on a different road, did that happen?

A. I don't remember, we did take a wrong road somewhere.

Q. Could you have found the bicycle without the Defendant taking you to it?

A. No, sir.

Q. After he told you that he wanted to talk to an attorney, at that time was he under arrest?

A. He had been told that he was under arrest.

Q. Was he under arrest?

A. Yes, sir.

Q. Would you read that part where you advised him about his right to an attorney?

A. Yes, "you have a right to remain silent, do you understand this," and his answer was "yes." "That anything you say can be used against you in a court of law, do you understand that," and Mr. Hass answered "yes." "You have a right to talk to your lawyer and have him present with you while your [*sic*] being questioned, do you understand that,"

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and he said "yes." "If you

cannot afford to hire a lawyer one will be appointed to represent you before any questiong if you wish one, do you understand that," and he answered "yes." "If you do give a statement you can stop talking at anytime you wish, do you understand that," and his answer was "yes." "Having these rights in mind, do you wish to talk to us now."

Q. Then after you advised him of all of this you had him out in the woods in a car and he told you that he was in serious trouble and he wanted to talk to his attorney, correct?

A. Not in those words, not in those circumstances.

Q. How did you get into the house, did you just say "may I please come in your house," and did he just say "okay," so you just walked in or did you kick the door in?

A. No, Mr. Hass was ahead of me and I told him to wait a minute and he stopped and I said "if your [*sic*] going in the house I'll either have to be invited in or stay out here."

Q. Then what happened?

A. He looked at me and then he turned around and he walked in at which time I went in right behind him.

Q. Did he close the door and you kick it open?

A. No, sir.

Q. When you first got in the house did you look at the other fellow in there and say "hey creature feature get your ass out here"?

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A. No, sir.

Q. You didn't do that, did you?

A. No, sir.

Q. What did that boy look like this Patrick Lee, did he have hair half way down to the ground?

A. No, sir.

Q. How long was his hair?

A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. Was he dirty?

A. Yes, I believe he was.

Q. Caucasian?

A. Yes.

Q. The person that you remember seeing this Patrick was caucasian, he was a dirty person but you don't remember if he had long hair?

A. It depends on what you mean by that, it wasn't half way down to the ground, no.

Q. How long was his hair?

A. Oh, approximately neck length I believe.

Q. Now, getting back to the statement that you got from Mr. Hass, you confronted him with the theft of a bicycle, is that correct?

A. That's correct.

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Q. And you don't have any question in your mind as to that?

A. Yes.

Q. And he advised you that this theft that he had done himself, is that correct?

A. Yes.

Q. So, you don't have anything from your investigation—do you have any reason to believe that he didn't go to the garage and get them himself?

A. Yes.

Q. What is that?

A. I have—I had a description by a previous witness Robert Lehman of the person who took the bicycle from the garage.

Q. And this boy said that he was the one who had stolen the bike?

A. Yes.

Q. He was talking about the theft?

A. Yes.

Q. Did he tell you that he had gone to the garage and taken them?

A. No, sir.

Q. He didn't know the exact residence?

A. He couldn't—he didn't know the house number but he could take me to where they were stolen.

Q. To the area?

A. No, he could take me to the house where they were stolen

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from.

Q. You didn't state that before, did you just forget or did you want to change—

A. What I said was that he didn't know the exact address.

Q. Now, your [*sic*] saying that he did know the exact residence but that he just didn't know the number?

A. That's correct.

THE COURT: Your cross examination bears on the admissibility of this statement or is it cross examination on the merits?

MR. McKEEN: I think it's probably outside of this hearing and I will confine my questioning to what is relevant.

THE COURT: Proceed.

MR. McKEEN: Q. You took a statement from two people, one of them was William Hass and the other one was Patrick Lee?

A. Yes.

Q. Do you have any place in your notes where you have put in the statement that he needed money and had taken the bicycle?

A. No, sir.

Q. Did you write that down any place during the coarse [*sic*] of—

MR. CRANE: This goes again to the statement itself.

MR. McKEEN: This is a case where the District Attorney has given me copies of everything that was in writing and assured me that those were the only statements—

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MR. CRANE: Sam, I didn't say that and you know it. I spoke to you and told you yesterday that this was all that was in writing.

MR. McKEEN: I will amend that, he gave me the writing and told me that—those were the only statements that were in writing and produced to me the statements that he had made in writing.

THE COURT: The thing that the Court is confronted with here is whether or not any of this is admissible, the two elements of voluntariness and adequacy of waiver. If your examination relates to those two features or your contingent [*sic*] that there was an unlawful search then the Court will allow it but if it isn't on any one of those three issues then it needs to be done while the Jury is present.

MR. McKEEN: That's all the questions I have.

MR. CRANE: Q. Officer, during the coarse [*sic*] of your questioning of this Defendant, did you at anytime [*sic*] threaten him with any physical violence?

A. No, sir.

Q. Did you at anytime administer any physical violence to him?

A. No, sir.

Q. Did you tell him that things would go easier on him either in court or in other ways if he would tell you what

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happened?

A. No, sir.

MR. CRANE: That's all I have.

MR. McKEEN: Nothing further.

THE COURT: Any further?

MR. McKEEN: To save time I would agree that up to the point of Mr. Hass telling him that he wanted an attorney and that he was in a lot of trouble, that statement would be admissible but after that point I believe that all of the evidence incriminating this Defendant was illegally obtained and completely inadmissible.

THE COURT: Are there further Witnesses or additional evidence on the admissibility of the alleged statements?

MR. CRANE: No, Your Honor.

THE COURT: Does the Defendant intend to offer testimony or evidence on any of these three issues, the issue of voluntariness, adequacy of waiver and anything in support of the contingent [*sic*] that there was an unlawful seizure and so forth?

MR. McKEEN: Yes, I would like to call—

THE COURT: Before you present that evidence, I would like to ask Officer Osterholme to state when it was that the Defendant first mentioned something about a lawyer?

OFFICER OSTERHOLME: It was approximately—I would say a mile away from Washburn Way, possibly in that area when

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he made the statement, he said "gee, I know I'm in a lot of trouble," and then later he said "do you think I could phone later," or something like that to which I replied "Yes, that we would make a phone available to him as soon as we got to the station."

THE COURT: Anything further?

OFFICER OSTERHOLME: Then he asked me "do I have to show you where this bike is," and I said "no, we're not going to force you too [*sic*], however, we would like to get this cleared up tonight," at which time he thought for a minute and then did go where the bike was.

THE COURT: As I understand it you were on your way to where the bicycle was when this item first came up when he said "gee, I'm in a lot of trouble," and then later on something was said about a lawyer?

OFFICER OSTERHOLME: Yes.

THE COURT: Did I understand it that this is where he was directing you too [*sic*] at that time?

OFFICER OSTERHOLME: Yes.

THE COURT: And that was the first time that he said "gee, I'm in a lot of trouble"?

OFFICER OSTERHOLME: Or words to that effect, yes.

THE COURT: And then some period of time elapsed before he mentioned the lawyer?

OFFICER OSTERHOLME: Yes, as I remember it was close to a

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few seconds, he just seemed to be thinking there.

THE COURT: Where were you at that time?

OFFICER OSTERHOLME: I was in the front seat of the patrol car and I don't remember exactly whether the Defendant was—I believe he was in the right front seat.

THE COURT: Where in the County were you in the car?

OFFICER OSTERHOLME: Approximately—within a mile or so of Washburn Way.

THE COURT: Had you gone beyond your patrol office?

OFFICER OSTERHOLME: No, sir.

THE COURT: And what was it specifically that the Defendant said about a lawyer?

OFFICER OSTERHOLME: He said "do you think that I could phone my lawyer," or words to that effect.

THE COURT: Just relate the conversation between the two of youfrom [*sic*] and after that point, please?

OFFICER OSTERHOLME: I told him that we would make a phone available too [*sic*] him at the patrol office if he desired to do so and then a short time after that he asked me if he had to show me where the bike was and I told him that I wasn't going to force him too, [*sic*], however, we did want to get this case cleared up

that night and since we were out in this vicinity that if he would show us, which he agreed to do.

THE COURT: Then what happened?

OFFICER OSTERHOLME: And then we did proceed and we

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retrieved the bike from the weeds on Washburn Way.

THE COURT: Further examination by either Council [*sic*]?

MR. McKEEN: No, Your Honor.

MR. CRANE: Q. Was Mr. Lee also in the patrol car?

A. Yes.

Q. Did he participate at all in the finding of the bicycle or taking you to the bicycle?

A. He agreed to help find the bicycle, yes, but he was new in the area and didn't know any of the roads.

Q. Did he have any active part in directing you down any of the roads or anything of that nature?

A. He did get out of the car at one point, we did stop to search for the bicycle and it was twenty five yards from where the bicycle actually was, there were heavy weeds and he did attempt to search for it there, however, Mr. Hass was the one who gave us the better direction to spot where the bicycle was.

MR. CRANE: That's all I have.

THE COURT: You may step down, Officer Osterholme for a few minutes. Anything further.

MR. McKEEN: For the limited purpose of the search or the evidence following the advice as to the attorney I would call William Hass.

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ROBERT [*sic*] HASS

was thereupon produced as a Witness in behalf of the Defense, and having been first duly sworn on oath, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. McKEEN:

Q. Would you state your name and address, please?

A. William Robert Hass, 4500 Green Springs Drive.

Q. I'm going to refer you now to the point where you were in the patrol car when you were going to direct the police to the bicycle that you had thrown in the bushes?

A. Yes.

Q. Are you with me?

A. Yes.

Q. Okay, what were the sequence of events that happened regarding your request for an attorney in your own words and how did this come about?

A. Well, I just figured out that I was in a lot of trouble and I said that I wanted to see a lawyer and he said "well, I can't let you do that," and so then he says

"I'll let you when we get to the station" and then we went down—I don't know exactly the road but we went down this road and fished out the bike.

Q. Did you get on the wrong road when you were trying to do that?

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A. The first time, yes.

Q. Did you use your directions after you got on the wrong road as to where the right road was?

A. Yes.

Q. Was that after you told him that you wanted to talk to your lawyer, that you were in a lot of trouble?

A. Yes, before I turned over the bike.

MR. McKEEN: That's all I have.

MR. CRANE: I have no questions.

THE COURT: You may step down, Mr. Hass. Further testimony on these issues?

MR. McKEEN: No, Your Honor.

MR. CRANE: No, Your Honor.

THE COURT: As I understand it, that portion of the alleged statement of the Defendant up to the point when he mentioned to the Officer that he would like to talk to his lawyer, there is no contest about that?

MR. McKEEN: Correct.

THE COURT: And from and after that point, what is it that the State is intending to introduce?

MR. CRANE: Well,—

THE COURT: Are you intending to offer any of the Defendant's statements to the Officer in the patrol car or thereafter that point?

MR. CRANE: Your Honor, we would introduce evidence that

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this man, the Defendant was the one who took the Officer—Officer Osterholme and showed him the houses where the bikes were taken from, he took them back and showed them the Carlson Drive address and also the Sage Way address, Cherry Way address.

THE COURT: Is this prior to their going to the—after they had gone to the station?

MR. CRANE: No, it's my understanding that this was after they had picked up the bicycle that they then went back up to Moyina Heights and went to the Lehman house and then went over to the Cherry Way address prior to going to the jail where the Defendant was booked.

THE COURT: Defense motion?

MR. McKEEN: First of all, Your Honor, I would like to remind the Court that the first Witness here that was brought before this Jury, over objection, it was represented that they could tie this into the Defendant as part of a scheme, pattern and design and certainly that representation would have to be met by competent and admissible evidence and the Court let this evidence in before the Jury only on that representation. Now, it

develops that the Defendant as to all of that incriminating matter had requested an attorney and had been refused one and so the Jury has it completely implanted in their mind the fact that the Defendant is involved in two burglaries—two

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garages, not only two burglaries. Mr. Crane represented in front of the Jury that the Defendant—that it involved this Defendant and I would ask that not only that be stricken as part of the State's case but that the Court grant a judgment of acquittal, that there has been improper evidence and that the Defendant is already under jeopardy and that it was done intentionally and in the alturnative [*sic*] I would ask for a mistrial. That under no circumstances should evidence come before this Jury that the Defendant caused himself to be incriminated after he asked for an attorney and was refused. Any attorney would have told the Defendant not to go to this bicycle or not to go to any house. I think this was a gross violation of the Defendant's rights.

THE COURT: As I understand it you feel the fact of the recovery of the bicycle out there on that occasion is not admissible?

MR. McKEEN: Yes, if the State—the State has already used that so much that I'm going to have to use that myself to put in my defense, there is no other way that I can get that away from the Jury.

THE COURT: Why is it that you say that it is inadmissible?

MR. McKEEN: This was stemming from a conversation and a search after the Defendant was denied Council [*sic*], rather than a physical object it was testimony stemming from an illegal

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search, the testimony of the Defendant pointing out a house and certainly this is incriminating and he done this after he was denied Council [*sic*].

THE COURT: The Court sustains the objection to any of the admissions or statements of the Defendant from and after the time when he first stated that he wanted to see an attorney and the Court sustains the objection to the identification by the Defendant of the locations [*sic*] where the bicycle was taken unless the fact situation is other than you have indicated. Now, the fact that the bicycle was recovered and where it was recovered may be revealed to the Jury but not the Defendant's participation in it. We'll take a ten minute recess.

(Whereupon a ten minute recess was taken)

(In the presence of the Jury)

THE COURT: Proceed.

MR. CRANE: Q. Officer, when you contacted the Defendant, did you advise him of his rights?

A. Yes, I did.

Q. Did you use a form when you did that?

A. Yes.

Q. What is that form?

A. Form 45, the standard police—State Police Advice of Rights form.

Q. Do you have that form that you used when you talked to the

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Defendant?

A. Yes, I do.

Q. Would you tell the Jury what you told the Defendant and then his responses to your questions?

A. Yes, I advised Mr. Hass to answer the question yes if he understood and no if he didn't understand and I informed him that it was my duty as a police officer to inform him of his rights. "You have the right to remain silent, do you understand this," and he answered "yes." "That anything you say can be used against you in a court of law, do you understand that," and Mr. Hass answered "yes." "You have the right to talk to a lawyer and have him present with you while your [*sic*] being questioned, do you understand that," and Mr. Hass answered "yes." "If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish one, do you understand that," and Mr. Hass answered "yes." "If you give a statement you can stop talking at any time you wish, do you understand that," and Mr. Hass answered "yes." "Having these rights in mind, do you wish to talk to me now," and Mr. Hass answered "yes."

Q. What did you tell him that you were doing there?

A. I told him that I was there investigating the theft of a bicycle.

Q. Would you tell us the exact words as you remember them,

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remember the conversation that you had with Mr. Hass at that time?

A. I don't remember the exact words but Mr. Hass stated in substance upon response to some questions that I had asked that he hod stolen a bicycle that day and I was there investigating it and then through my questions and my investigation he was talking about two bicycles, he stated that he had given one back and I asked him if he had returned the one where the man had to follow him and take it and he said that's the one that he had given back—

MR. McKEEN: Excuse me, I'm going to object, we've had a hearing out of the presence of the Jury as to what statements were made in the presence of the Defendant and now this Witness is testifying to things that he didn't say before and I am now claiming that this is prejudicial at this point and I think that the Witness should be advised that the only testimony as to the statements are those which was given outside of the presence of the Jury and subject to the Court's rule.

THE COURT: If these statements were at residence then the objection is over ruled [*sic*].

MR. CRANE: Q. Go ahead?

A. I then asked Mr. Hass why he had stolen the

bicycle and he told me that he was out of work and I asked him if he had been working and he stated that he had, had been

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working at Weyhaeuser [*sic*] but he quit because the work was too hard on him. I then asked him why he had stolen the bicycle and he said because he needed money to eat and that was basically the extent of the conversation there.

Q. Did you ask him anything about the other people involved?

A. Yes, I asked him where the individual was that had ridden the bike out of Mr. Lehman's garage and he replied that he was in the house and so we went in and contacted a Mr. Patrick Michael Lee.

Q. Did you ask Mr. Hass about a third party?

A. Yes, I did.

Q. And what did he respond to that?

A. I asked Mr. Hass and Mr. Lee if there was another fellow with them that had taken any of the bicycles involved in this and they reported to me that he was a hitch hiker [*sic*] but that he had not participated in this.

Q. Did you subsequently recover another bicycle?

A. Yes, I did.

Q. Where did you recover that?

A. That bicycle was recovered from Washburn Way.

Q. And did you take that bicycle to Mr. White?

A. Yes, I did.

Q. And did he identify that as his son's bicycle?

A. Yes, he did.

MR. McKEEN: I want the record to show that I object to

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that testimony based on my previous objections.

THE COURT: Is that the only objection?

MR. McKEEN: The objection that the fruits of the poison tree stems from an illegal search taking place after the Defendant's rights were violated and that this is improper before this Jury.

THE COURT: Those objections are over ruled [*sic*].

MR. CRANE: That's all I have.

CROSS EXAMINATION

BY MR. McKEEN:

Q. Officer, you testified previously that your recollection in this case would be better served if you were allowed to use your notes, is that right?

A. Yes.

Q. And have you used those notes in your testimony?

A. Yes.

Q. And you have testified here as to what the Defendant said, the conversation back and forth and then when you talked to him and another Defendant within that same period of time or in that close period of time—you talked to two people involved in this crime, did you not, Patrick Lee and the Defendant?

A. Yes, I did.

Q. And you don't remember the idential [*sic*] words that the Defendant was suppose [*sic*] to say to you but the substance of what

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was said?

A. In substance what he told me.

Q. And you don't remember this word for word, do you?

A. No, not word for word.

Q. And your testimony was such that it aided you in using your notes that you have before you?

A. Yes.

Q. I would like for you to point out to the Jury that portion of your notes that refreshes your recollection as to anything that the Defendants said reguarding [*sic*] needing money and having taken the bicycle because he had lost his job, would you point that out to the Jury?

A. I didn't write that down in my book when I contacted Mr. Hass.

Q. You didn't write any words down except that he admitted the theft of the bicycle?

A. Excuse me while I refresh my recollection from my notes.

Q. Again, for the record, you are checking your notes to determine the answer to that question, are you not?

A. What was your question?

Q. At the present time you are checking your notes, are you not?

A. Yes.

A. Okay, go ahead—

A. I do have in my notes after informing Mr. Hass of his

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rights he admitted taking the two bicycles that day and he stated that a person was with him and he was in the house.

Q. Is that the extent of what your notes say as to what he said?

A. That's the extent of what I have in my notes, yes.

Q. Everything else that you have said is just the substance of what you believe was said, is that correct?

A. Yes, that's correct.

Q. During that same period of time you talked to two people involved in this case, did you not?

A. Yes, I talked to two people.

Q. And when you went up to the Defendant you told him that he was involved—not in those exact words but you were talking to him about the theft of the bicycle, were you not?

A. That's correct.

Q. And what was his response to the question about the theft of the bicycle, he admitted doing it, correct?

A. Yes.

Q. And he told you he did it himself, is that correct?

A. No, I don't believe he ever stated that he actually did it himself.

Q. Did you testify while the Jury was gone that he himself had stolen those bicycles?

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A. If I can clear that point up, Mr. Hass never told me that he took any bicycles from any garage or any residence, he did admitt [*sic*] stealing the bicycles himself, yes.

Q. And he gave it to you as though he himself had committed the crime of stealing the bicycles?

A. Yes, at that time.

Q. He was telling you from his point of view, from his mind was that he not through someone else but that he had stolen the bicycles, is that correct?

A. Yes.

Q. Yet, from the investigation of this case you know that he's not the person that went into the garage and took the bicycle, do you not?

A. I only have an opinion there.

Q. Well, you investigated the case, didn't you, Officer?

A. Yes.

Q. And you talked to the Witnesses and learned that it was a person who took the bicycles with black hair?

A. Yes.

Q. And it was not this Defendant?

A. Yes.

Q. But your [*sic*] telling us now that when he gave you the statement he said that he had stolen the bicycles?

A. Yes, that's correct.

Q. And this statement was given the first time that you

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contacted Mr. Hass?

A. Yes, that's correct.

Q. Didn't he tell you that two bicycles had been taken?

A. Yes, he did.

Q. Did he tell you that he took both of them?

A. In substance, yes.

Q. And yet from your investigation you know that as to taking them from the buildings that he couldn't have taken either one of these bicycles, do you not, Officer?

A. No, sir.

Q. Well, let's then refresh your memory again, the first bicycle that was taken—not the first but the first bike that you were investigating, the Witnesses saw a person with dark hair and not this Defendant, right, Officer, is that true?

A. Yes.

Q. Then through your investigation you learned that they found the car and there were only two people in the car, correct, when they found it?

A. I don't have it in my report as to how many people were in the car.

Q. When you were questioning the Defendant the questions that you asked and the responses that he gave involved only the stealing of the bicycles, is that true?

A. That's correct.

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MR. McKEEN: That's all I have.

MR. CRANE: I have no further questions.

THE COURT: You may step down, Officer Osterholme.

* * * * *

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WILLIAM ROBERT HASS

was thereupon produced as a Witness in behalf of the Defense, and having been first duly sworn on oath, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. McKEEN:

Q. Would you state your name, please?

A. William Robert Hass.

Q. What is your address?

A. 4500 Green Springs Drive.

Q. In Klamath Falls?

A. Yes.

Q. And for approximately how long a period of time have you lived there?

A. Oh, roughly a year and a half.

Q. What is your marital status?

A. Engaged.

Q. Have you ever been convicted of any crime?

A. No.

Q. How old are you?

A. Twenty two.

Q. Are you acquainted with Patrick Michael Lee?

A. I met him.

Q. Okay, do you know what the name of the other boy involved in this was?

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A. Bill Walker.

Q. Bill Walker?

A. Yes.

Q. When did you know those persons?

A. When I was in school, five or six years, I seen them around, you know, I never talked to them then but I saw them just about a day before this happened.

Q. Okay, are they from a different area of the country?

A. Yes, Nevada.

Q. Now, you told the police that there was a hitch hiker [*sic*] and that he didn't have anything to do with this, you told the policeman that, is that correct?

A. Yes.

Q. Was that true?

A. No.

Q. Would you explain that?

A. Well, there was Bill Walker, Pat Lee and Bill Walker was the one that took the other bike.

Q. You lied to the police so that you wouldn't get your friends in trouble, is that correct?

A. Yes.

Q. Do you know now that that was wrong?

A. Yes.

Q. Now, referring you to the day of—the fourth day of August, 1972, being the date of the incident that your [*sic*]

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charged with, do you recall that day?

A. Yes.

Q. And did you see those friends that you mentioned on that day?

A. Yes.

Q. And about what time did you first see them?

A. It would have been noon that day.

Q. And what did you do after you met these fellows?

A. We went to Idella's and got some beer and rode around drinking beer.

Q. What kind of beer?

A. Old English 800.

Q. Is that any different than regular beer?

A. Yes, it's compared to like about—about three times as powerful, it's malt liquor.

Q. Had you known in the mean time in these two

years since you had seen the fellows what they had been doing or anything of that nature?

A. No.

Q. Whose car did you have?

A. It was my car but Bill Walker was driving because I had my license—

Q. Just a minute, would you describe your car?

A. It was a 1958 Volkswagen panel and I cut off the top and I was going to put a camper on the back of it and all

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it was pretty nice and I was going to wait until winter came around before I put anything back on it and I had a gold shag carpet around the windshield and the doors and everything.

Q. And this was visible from the outside of the vehicle?

A. Yes.

Q. Have you ever seen another vehicle—Volkswagen like that one?

A. No, never.

Q. That was the vehicle that you had on that day?

A. Yes.

Q. Now, you bought some beer at Idella's and when you came out who drove the car?

A. Bill Walker.

Q. Why was that?

A. I didn't have a license.

Q. Okay, you never had a license or had it been suspended or what?

A. I got in an accident a couple of years ago and I didn't have any insurance and it was suspended.

Q. And was that suspension in effect at that time?

A. Yes.

Q. Then, where were you sitting in the car while Bill Walker was driving?

A. On the passenger side right next to the door.

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Q. And what did you do then after you guys got in the car and after you bought the beer?

A. Well, we stuck to the back streets, you know, just drinking beer and stuff so that just in case the highway patrol did come on—we were just cruising the back streets, you know, they're more apt to be on main street.

Q. Were you going any particular place?

A. No, just riding around.

Q. And did the people that you were with, were they from—familiar with Klamath Falls?

A. No.

Q. Why is that?

A. I guess because they had only been here for a day.

Q. So, tell us what happened then when you were cruising around?

A. Well, we were cruising around and then all of a sudden Bill Walker stopped and—

Q. At that point did you notice where you had gone or where you were going or particularly what you had been doing?

A. No.

Q. Had the people that you were with been talking about anything?

A. They were just mumbling something, I didn't know, I just wasn't paying any attention.

Q. And had this beer at this time that they stopped that you

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had drank been enough beer so that you could tell that you had been drinking?

A. Well, I was pretty relaxed.

Q. Did you have any idea, any thoughts of anybody committing any crime when they were in that car?

A. No.

Q. Okay, what happened then when they stopped?

A. Well, Bill Walker got out and Pat Lee got out and they said to go down the street and then turn left, you know, just—

Q. At that time you must have known theydidn't [*sic*] live there, you know that?

A. Yeah, they didn't live there, no.

Q. Well, what went through your mind as to why they stopped there?

A. Well, they were arguing back and forth and I thought they were going to fight or something but I

really wasn't paying that much attention to what they were doing.

Q. Did it surprise you when they told you to stop the car and told you to go down the block?

A. Yeah, you know, like there [*sic*] from Nevada and then they stopped the car and then they get out and I don't know what's up.

Q. What did you do then?

A. I was just going about five miles an hour down the street

[91]

and then down there I turned the corner to the left and I kept on going and I was going real slow, about five miles an hour, maybe ten and then I came to the stop sign there and then maybe about thirty seconds all of a sudden Pat come up and toss [*sic*] the bike in and said "get the hell out of here," and he ducked down on the floor.

Q. Who is Pat?

A. Patrick Lee.

Q. And at that time you knew that the bicycle was stolen, didn't you?

A. Yeah, I figured that.

Q. Okay, up to that point did you have any idea what Pat Lee or that other fellow was going to do?

A. No.

Q. Where was this other fellow when Pat Lee threw the bicycle into the Volkswagen?

A. I don't know.

Q. He wasn't there?

A. No.

Q. Then, what did you do when he said "get the hell out of here"?

A. I kept on going straight, I didn't know what to do.

Q. When you came to the stop sign did you stop?

A. Yeah, I think there was—well, the first time that I stopped is where he tossed it in the back, he threw it in the

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back and he got in the car and he said "get the hell out of here," and I was just going down the street and I kept on going straight until I came to that main street, there was a stop sign there and I waited for the traffic to clear and then I kept on going straight.

Q. Why did you go with him when you knew that he had stolen a bicycle?

A. I didn't know that he stole it at first but then he said to get the hell out of there and then we come to this dead end—

Q. You knew that you were stealing a bicycle the same as he was, didn't you?

A. Well, the bicycle was in the back of my car and I knew that I could get into as much trouble as he could and so we came to this dead end I turned into [*sic*] toss this bicycle out, there is this little—there is a railroad

track there and a fence and when we came to the dead end in this field we were going to take the bicycle out and throw it out and we had just come to a stop and here come this Jeep winging around the corner.

Q. Do you mean at that point it was your intention to get rid of the bicycle and get it out of your car?

A. Yeah.

Q. Was it ever your intention of selling it or getting money for it or anything like that?

[93]

A. It was my intention to get rid of it as soon as possible.

Q. Now, who the bought the beer that you had previously?

A. I did.

Q. Did the other boys have any money?

A. No.

Q. Did you have any money?

A. I had around five or six dollars.

Q. Then, you went to throw the bicycle out and these people came and then what happened?

A. Well, we just come to a stop and then this Jeep came winging up around the corner and he turned down the street and cut us off and Mr. Lehman, he says "have you seen a guy ridding [*sic*] a bicycle," and Mr. Lehman's son goes "that's the guy, that's him."

Q. Pointing to who?

A. Pat Lee and then Pat got out of the car and there was a sleeping bag over it, all spread out and Pat was trying to make up something that it was George's bike and that George said that he could use it or something along that line.

Q. Did you say anything?

A. No, they didn't even look at me, I didn't turn around.

Q. Did you look at them?

A. Yeah, I saw them and I saw it when Mr. Lehman's son said "that's him there," and the next thing I knew Pat was out

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of the car and handing Mr. Lehman the bike and making some excuse.

Q. Were you scared at that point?

A. I was scared the first time when that bike came flying in the back of my car.

Q. How did it get covered up with the sleeping bag?

A. Well, Pat got it [*sic*] the back after he threw the bike in the back of the car on the floor and then when we got up to the second stop sign if I recall right, that busy street, Sixth Street or Main Street then he covered it up with the sleeping bag and then we just kept on going and then we came to this field where we were going to get rid of it.

Q. Did you tell him that you wanted to get rid of the bike, that you didn't want to get caught with it?

A. Yeah.

Q. Do you remember whether he said anything about that or not?

A. He said something about that we could get out of here, you know, get rid of the bike and stuff like that.

Q. Where was this other boy that had been with you at that time?

A. Well, after we got pulled over and gave the bike back and then Pat goes down this street here—

Q. Just a minute, did you know where this other fellow was?

A. No, I didn't know where he was.

[95]

Q. Had you seen any other bike other than this one?

A. No.

Q. Then, after they got their bike, then what happened?

A. Then Pat goes—said go straight down there to this busy street and there was Bill Walker sitting down there and he had this other bicycle by him and so then we pull up and he takes the bike and throws it in the back and I said "what are you doing," and he said "got another bike," and I said "no, we're not," and I turned around and I took it out by Washburn Way and I threw it as far as I could.

Q. Did you throw it away so that—did you take care of the bike so that you could come back and pick it up later or what?

A. I wasn't worried about hurting the bicycle, I was more worried about getting caught.

Q. This Walker, why was it that you didn't leave him there instead of letting him take advantage of you further?

A. Well, I sort of knew the people half way.

Q. You knew that he was from Nevada at that time?

A. Yes.

Q. You did know that what you were doing then was wrong, did you not?

A. Yes.

Q. And did you know that that was a stolen bicycle?

A. Yes.

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Q. Later you told the police that you had stolen two bicycles, didn't you?

A. Yes.

Q. Did you go into anybody's garage at any time during this?

A. No.

Q. Or anybody's house?

A. No.

Q. Did you have any knowledge as to any discussions that would cause you to believe that somebody was going to burglarize a house in broad daylight with your car out front on the day that this occurred?

A. No.

Q. Then, did you have any knowledge of your as to where the bicycles came from?

A. I figured they came out of the area—you know, where I dropped Pat and Bill off.

Q. Now, were you arrested for this charge?

A. Yes.

Q. And were you placed in jail with any of the persons that were involved with you?

A. Yes, Pat Lee.

Q. Did you ever learn through Pat Lee what the reason was why they had done this?

A. Yeah, they were going to get some money—going to sell the bikes to get some money to get up to a job in Lake Tahoe,

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a construction job or something.

Q. That is down where they live?

A. Yes.

Q. Did you have any intention of going down there?

A. No, I live up here.

Q. You had lived up here for a couple of years, had you not?

A. Almost a couple of years.

Q. When the officer came out to talk to you, would you tell us what was said and what happened?

A. Well, he came up to the door and he asked for Bill Hass and I told him that was me and we went to the car and he gave me my rights and everything and then asked where was the bike and I told him that I took

two bikes and that the people got one back and then the other one was out in the weeds.

Q. Why did you tell him that you took two bikes?

A. Well, it was my car that hauled them off.

Q. Okay, did you mention anything—did he mention anything to you about who went in the garage or who went in the house or anything like that?

A. He said something like the bike that you took from such and such garage or something like that.

Q. Then what happened when you went into the house?

A. Well, he asked me if he could step in there, there was sort of a small porch and he asked me if he could come in

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and I didn't say anything, close [*sic*] the door and the next thing I knew the door flies open and he said to get outside—

Q. To you?

A. To Pat.

Q. What words did he use to Pat?

A. He said "you creature feature, get your ass outside."

Q. Did you tell him anything as to who was in the house or anything like that?

A. I told him about where my friend was with the dark hair that he was inside.

Q. So, at that time you had a chance to tell him about the other guy and you didn't do so?

A. Pardon me?

Q. At that time you didn't tell the police officer about this other fellow, about Bill Walker?

A. Yeah.

Q. At that time when you talked to the police officer did you ever tell him that you needed money and that's the reason you took the bicycle?

A. No.

Q. Do you have any idea where he got those words or why he said that under oath?

A. From Pat.

Q. At that time that the police officer talked to you, did

[99]

you know that stealing a bicycle and burglary in a building were two separate things?

A. I'm not familiar with the laws or anything, you know, if you take something from like a store, I don't know, stealing is wrong.

Q. You knew that stealing was wrong, is that right?

A. Yes.

Q. You felt that when you put the bicycle in your car that was stealing?

A. Yeah.

Q. Did you ever deny to the police officer other than what you have told us, did you ever deny to the police

officer that you had been the one that had stolen those bicycles?

A. No, I included myself in like the bank robber who gets—in the get away car I guess, I had no idea they were going to take the bikes but the first thing that I knew Pat comes up and throws the bike in the back of my car and an accomplice is just as bad.

MR. McKEEN: That's all I have.

CROSS EXAMINATION

BY MR. CRANE:

Q. When you talked to the officer, Officer Osterholme, were you employed at that time?

A. No.

Q. Had you been employed at Weyerhaeuser?

[100]

A. Yes.

Q. How long had it been since you've worked?

A. July 20.

Q. Did you have any money owing from them to you at that time?

A. Yes, I had picked up around a sixty dollar check down in Carson, I had picked the check up and that was from Weyerhaeuser.

Q. When was that?

A. The day before.

Q. Okay, this place where you were living, who's [*sic*] address was that?

A. It was mine.

Q. Were you renting it?

A. Yes, I am renting it.

Q. Now, at the time, how long do you think you were driving around before this incident happened?

A. Oh, I would say two or three hours, I wasn't keeping track of time.

Q. How much beer did you buy?

A. Just a six pack.

Q. And how many of those out of the six pack did you have?

A. Well, we each got two and there were—they were half quart cans and that equals about three quarts of any other kind of beer, this was Colt 45 malt liquor.

Q. So, you drank two half quart cans in the course of two

[101]

or three hours, is that correct?

A. I had—within forty five minutes from the time that it was bought.

Q. You had driven around for a period of time before you bought the beer?

A. No—Well, we went to Idella's and we bought the beer and we drank the beer, in about—oh, an hour and a half we drank the beer and then the first thing I knew the car stopped and they got out and that's when it started.

Q. Okay, during the course of this hour subsequent

to the time that you were drinking the beer, what area were you driving and where were you driving?

A. Well, we were driving around all over, over here by the K.O.A. Camp Grounds and things like that.

Q. By K.O.A.?

A. Yeah, and driving mostly on the back streets and then for about the last maybe ten or fifteen—ten or twenty minutes mostly up in that area up there.

Q. In Moyina Heights?

A. Yeah.

Q. Why were you driving the back streets?

A. Well, the police travel mostly the main streets, you know.

Q. But you had completed your drinking about an hour before that, why were you still driving around the back streets?

A. Well, there were empty cans of beer in the car and everything.

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Q. You were just driving around with empty cans and you were staying on the back streets, is that your testimony?

A. Well, I really don't know, I wasn't driving, I was just riding and enjoying the scenery.

Q. Now, you testified that the other two parties were mumbling among themselves, you don't know anything that they were saying, is that right?

A. Well, I know that they said something, this was like a convertible and it was pretty windey [*sic*].

Q. All three of you were in the front seat?

A. Yes, there was no rear seat or nothing.

Q. And this Volkswagen bus has an engine in the rear, is that correct?

A. Yes.

Q. Were you traveling at a high rate of speed in that area?

A. No.

Q. Were you going fairly slow down the road?

A. Twenty or thirty miles an hour.

Q. And you were driving in the Moyina Heights area for ten to twenty minutes, is that what you said?

A. Yes.

Q. And you heard Mr. Lehman testify that you went past his house about three times, do you think that is correct?

A. It's possible, I wasn't watching, I was pretty relaxed.

Q. You weren't watching?

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A. No.

Q. And you weren't listening to what they were saying?

A. No.

Q. What were you doing?

A. Just watching the scenery.

Q. Okay, you were watching the scenery, are you

telling me that you were watching the scenery and you had no idea where you were?

A. I knew where I was.

Q. You had no idea when you were traveling down that street about three times when you were watching the scenery—it didn't look repetitious to you maybe that you had seen that house before?

A. Well, if you travel a street three times you only travel—you only see the one side one time, your [*sic*] watching this side and when you come back your [*sic*] watching this side.

Q. Your [*sic*] saying that you went up and back on this street?

A. It's possible.

Q. Did you or didn't you?

A. I really wasn't aware of it.

Q. You just weren't aware that you were on that street—

A. I was aware that I was on a street.

Q. Do you recall going up that street and turning around and coming back?

A. If you went up it three times you would go up this way

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and you were watching this side and then when you come back your [*sic*] watching this side, I was sitting on the passenger side and one side doesn't look like the other side.

Q. You went up and down that street three times and you knew it?

A. I wasn't counting.

Q. Okay, you knew that you were going up and down that street a number of times?

A. Well, it looked—

Q. Come on now, is that right or wrong?

MR. McKEEN: I would ask that the Witness be allowed to answer.

MR. CRANE: I agree, your Honor.

THE COURT: Proceed.

MR. CRANE: Q. You were aware that you were going up and down that street?

A. I was aware that I went up that street.

Q. And you were aware that you were going up that street a number of times, more than once?

A. Yes, sir.

Q. Now, you weren't paying any attention because you were watching the houses, is that right?

A. Well, that's a pretty nice area up there.

Q. I agree—

A. I was watching as we would go down one side of the street

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and then I would watch this side and then we came back and it looked familiar and then we turned and they stopped.

Q. Okay, what about the other street, what about Cherry Way, do you remember going up that street?

A. I don't remember going up—I don't even remember what streets.

Q. How many times did you go up and down Cherry Way?

A. I couldn't tell you. I would say none but I would say that they went down once and went half way and then they stopped and then got out and I drove.

Q. That was on Cherry Way that they stopped?

A. I wouldn't know if it was Cherry Way from Carlson Way.

Q. You went by two houses that had bicycles near them, are you telling us that you didn't hear anyone mention the word bicycles at all when you were cruising around in that crowded area, they never mentioned stealing bicycles to your knowledge?

A. No, sir.

Q. Not one word was said?

A. I didn't hear anything about stealing bicycles.

Q. What were they arguing about?

A. Oh, they were getting on each others [*sic*] nerves and stuff like that.

Q. About what?

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A. I have no idea.

Q. Were they arguing in loud voices?

A. Once in a while they would get a little loud.

Q. What were they saying?

A. I wasn't paying any attention.

Q. Alright, they stopped, did they appear like they were going to get out and fight, were they mad at each other?

A. Well, during the day they were yelling at each other.

Q. I mean at the time they stopped the bus and one of them said to you to drive down the street, I'm asking you when they got out of the bus did they appear like they were going to fight to you?

A. No, sir.

Q. You didn't really think they were going to fight?

A. Well, I couldn't say what they were thinking.

Q. I'm asking you what it looked like to you, you didn't think they were going to fight really, did you?

A. Well, I couldn't say what they were going to do.

Q. I'm asking you seriously, you told us earlier that they were arguing and you thought they were probably going to get out and fight, did they look like when they got out of the car, did they look like they were going to fight, did you believe in your own mind at that point that they were going to fight?

A. I couldn't say, I had no idea what they were going to do,

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I couldn't tell you what one person was thinking.

Q. Now, you hadn't driven the car because of the fact that your license was suspended?

A. Yes.

Q. And two men get out of your car and tell you—they don' t tell you a thing as to what they're going to do but they tell you to drive down around the corner and park and so you do that?

A. Yes.

Q. What did they say?

A. Drive down around the corner and turn left and just keep on going.

Q. Just keep on going?

A. Uh huh.

Q. And so you get behind the wheel and you drive down and you turn left and you just keep on going just like they told you to do?

A. Yeah.

Q. You had no idea what they were going to do?

A. No, I was feeling pretty good, you know, I really didn't care what they were going to do but then later on I found out.

MR. CRANE: No further questions.

REDIRECT EXAMINATION

BY MR. McKEEN:

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Q. When they said drive down, did they wait for your answer or were they on their way someplace?

A. They got out of the car and they started walking and so I drove down around the corner and then turned left and kept on going.

Q. At that point, do you recall what was going through your mind when these guys got out of the car, do you recall what was going on in your mind?

A. I really couldn't say what was going on, I couldn't judge as to somebody else.

Q. Your not saying that during this entire time that you were there that they didn't talk to you or you didn't talk to them once in a while about things?

MR. CRANE: I would object to this as a leading question.

THE COURT: Sustained.

MR. McKEEN: Q. Did you talk back and forth during this time?

A. Oh, yeah, you know, once in a while they would talk between themselves but like it was hard to talk to the driver when I'm way over here, I talked to Pat.

Q. Did you have any reason to believe that they were going to use your car to do anything like this?

A. I had no idea.

Q. Mr. Crane kept asking you over and over again and going up and down the streets, other than what has been described

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in Court as the streets, did you know at that time which particular streets you were on when you were on them at that time?

A. Which streets are you talking about now?

Q. Well, on any of the streets in Moyina Heights?

A. I'm not really familiar with them in Moyina Heights.

MR. McKEEN: That's all I have.

RECROSS EXAMINATION

BY MR. CRANE:

Q. Did you see other [*sic*] of the bicycles being taken from either of the residences?

A. No.

Q. Do you know where those residences were located?

A. No.

MR. CRANE: Nothing further.

MR. McKEEN: I have no further questions.

THE COURT: You may step down.

MR. McKEEN: That would conclude the Defendant's case and I would like to renew my motions that I have made previously with the same arguments.

THE COURT: Rebuttal?

MR. CRANE: I would need the Court's ruling as to whether or not I would have any rebuttal evidence.

THE COURT: The Jury may retire to the Jury room. You'll have at least ten minutes. Donot [*sic*] discuss this case.

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(Out of the presence of the Jury)

THE COURT: Proceed.

MR. CRANE: Your Honor, on the State's case in chief the State was not allowed to introduce evidence by Officer Osterholme that the Defendant had taken him to two residences where the bicycles were taken from and we would propose in our rebuttal case in view of the Defendant's testimony in Defendant's case that he didn't have knowledge of the two homes, we would propose to introduce evidence to the effect that he did take Officer Osterholme to these residences and I would site [*sic*] to the Court Volume 8 of the Criminal Law Reporter at page 3139 [*i.e., Harris v. New York*, 404 U.S. 222 (1971)].

THE COURT: We'll recess now for about fifteen minutes until I can look at some cases.

(Whereupon a fifteen minute recess was taken)

THE COURT: The objection to the proposed rebuttal is over ruled [*sic*] but the Court is going to give the Jury the usual instruction that they can receive that evidence not as evidence—substitutive [*sic*] evidence but only bearing on the credibility of the Defendant as a witness. Are you ready to call your Witness?

MR. CRANE: Yes.

THE COURT: Bring in the Jury.

(In the presence of the Jury)

THE COURT: Proceed.

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MR. CRANE: The State would recall Officer Osterholme.

(Officer Osterholme having been previously sworn resumed the witness stand)

DIRECT EXAMINATION

BY MR. CRANE:

Q. Officer Osterholme, you testified earlier in this case, is that correct?

A. Yes.

Q. You are still under oath, you realize that?

A. Yes.

Q. Officer, subsequent to the questioning of Mr. Hass and the questioning of Mr. Lee, did you take them into Moyina Heights area?

A. Yes.

Q. And did you have them point out homes where the bicycles were taken from?

THE COURT: Just a moment—

MR. CRANE: Excuse me, Your Honor.

THE COURT: Proceed:

MR. CRANE: Q. Were the houses pointed out to you?

A. Yes.

Q. Who did that?

A. Mr. Hass.

Q. Did he point out both houses where the bicycles had been taken from?

[112]

A. Yes.

MR. CRANE: That's all the questions that I have.

CROSS EXAMINATION

BY MR. McKEEN:

Q. Mr. Lee was with him at that time?

A. Yes, he was.

Q. And when you first talked to Mr. Hass did he tell you that he knew the area that they were in but didn't know any specific number or that he couldn't tell you by identification at that time the specific house?

A. No, he stated to me that he knew where the bicycles came from, however, he didn't know the exact street address.

Q. He told you that he would have to go out and show you?

A. Yes.

Q. And when you went out you had the person that had been with him, along with him, is that correct?

A. Yes, that's correct.

Q. Just so that we don't leave anything out as to what happened, had Mr. Hass asked you before you took out there to see an attorney and you refused to allow him to see an attorney?

A. He did ask me if he could see an attorney, however, I didn't refuse him.

Q. You told him he could see one when you got back to the station, is that correct?

A. No, sir.

Q. What did you tell him?

A. I told him that we would make a phone available at the patrol office and he then agreed to go ahead and continue the investigation with me.

Q. So, after you told him—after he told you that he wanted an attorney did he tell you that he was in trouble and wanted an attorney?

A. Yes, that was before.

Q. Then after he told you that he was in trouble and wanted an attorney did you have him show you where the bicycle was out in the field?

A. Yes.

Q. Then did you have him take you down to the area so that the boys could point out the house for you so that you could finish your investigation?

A. Yes.

Q. Then during any of that, did you let him see an attorney?

A. No.

Q. Why not?

A. He didn't request it.

Q. I thought you said that he did, why didn't you?

A. He didn't request to see any attorney at that time.

Q. Well, let's start over again, my question was did he mention an attorney to you before this happened?

A. Yes, he did.

Q. And tell us what he said?

A. He mentioned the words to the effect that he thought he was in a whole lot of trouble and wondered if he could talk to his attorney.

Q. Are you saying that he didn't ask you for an attorney?

A. Yes.

Q. Do you have any interest in this case, Officer, in the out come [*sic*] of this case?

A. Yes.

Q. Why is it that you didn't let this boy have an attorney before you had him—after he told you that he wanted one before you had him do these things?

A. What is your question, Mr. McKeen?

MR. McKEEN: Would the Reporter read back the question.

(Whereupon the last question was read to the Witness)

THE WITNESS: Mr. Hass if he would have insisted on having an attorney he would have been able to have one, he was not forced in anyway [*sic*] to do anything.

MR. McKEEN: Q. Let's go back now to that statement that you read to the Jury, would you pull that out again, the statement of Mr. Hass when you first talked to him?

A. Yes.

MR. McKEEN: I would ask that this be admitted into evidence.

[115]

MR. CRANE: No objection.

(Defendant's exhibit 'A' marked for identification)

THE COURT: Exhibit 'A' is received.

MR. McKEEN: Q. Now, Officer, did you have the Defendant sign this or anything?

A. No, I didn't.

Q. You signed it yourself and then you wrote his name in there, is that correct?

A. Yes.

Q. And you misspelled his last name?

A. Yes, I did.

Q. And you put down here that this was a burglary, did you not?

A. Yes.

Q. Why was it then when you first talked to him you said that he was accused of stealing two bicycles?

A. I didn't say that he was accused, that we were investigating the theft of two bicycles.

Q. And actually you were investigating a burglary, weren't you?

A. Yes.

Q. Why didn't you tell him that you were investigating a crimethat [*sic*] is similiar to murder instead of one that is similar to drunken drivng—

MR. CRANE: I would object—

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THE COURT: Sustaned.

MR. McKEEN: Q. Didn't you tell him that you were investigating a burglary case before you got these statements from him?

A. I wasn't sure of the burglary case, I wanted to make sure.

Q. And you wrote here "Burglary One, two charges"?

A. Yes.

Q. Did you know at that time the bicycles had to have been taken out of the garage?

A. No, sir.

Q. And then you wrote "Burglary one"?

A. Are you referring to what is written on the bottom line?

Q. Yes.

A. That's filled in later.

Q. Now, just tell us exactly what is filled in later?

A. Would you like me to show the Jury?

Q. Show the Jury?

A. Everything pertaining to his rights is filled in at the time, the exact time that the form is written and I also write his name in here and the reason for the misspelled word—name is because that's the way Mr. Hass told me to spell his name and he later gave me a different spelling on it and then burglary one and two charges is written down at the conclusion that night.

Q. Now, your [*sic*] telling this Jury under oath that at the time

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you wrote his name that he misspelled his name and it was later that you wrote burglary one, two charges?

A. Yes.

Q. It's your testimony that everything down to the word "case" clear to the bottom was written when you talked to the Defendant and the rest was written later, is that true?

A. Where it says arrest.

Q. The arrest was written in later?

A. The only thing written in later was burglary one, two charges.

Q. And it's your testimony that it was his mistake in spelling and not your error, is that true?

A. Yes.

Q. And you maintain that as you maintain other parts of your testimony under oath?

A. Yes.

Q. For instance, did you contact the Department of Motor Vehicles, Klamath Falls City Police to learn the name of the Defendant—

A. I did contact them, however, I didn't learn his name.

Q. What does this mean "8:30 p.m., writer contacted the City Police Department and obtained the name of William Robert Hass—"

A. That was from an accident report and I'm not sure if they gave the actual spelling.

[118]

Q. It's still your name [*sic*] that this boy gave you a phoney name?

A. Yes, sir.

Q. And then in your notebook you got his name as 'Haas', date of birth 5-24-50, do you have any reason to believe that that isn't his date of birth?

A. I would like to see my notebook to refresh my memory?

Q. Well, assuming that to be true—

MR. CRANE: I think he is entitled to see his notes.

MR. McKEEN: I'll withdraw the question.

THE COURT: Proceed.

MR. McKEEN: Q. Assume that to be true that you have placed the date of 5-24-50 in the notebook as the date of birth, do you have any reason to believe that that date would be untrue or uncorrect [*sic*]?

A. No, sir.

Q. You have also placed the Social Security number as 530386641, do you have any reason to believe that that would be incorrect?

A. No, sir.

Q. Where did you get those numbers and dates?

A. It depends on what time you have there, I believe I obtained that from Mr. Hass at the jail at the time

that I questioned him about the different spelling of his name.

Q. I'll ask you to look at the notebook and try to tell us if that took place at the jail?

[119]

A. This is when I contacted Mr. Hass.

Q. Okay, you got his name from the Department of Motor Vehicles and you came out to a Mr. Hass and he gave you his birth date and his Social Security number and then according to your testimony he spelled his own name, is that correct and you want this Jury to believe that?

A. Yes.

Q. You want this Jury to believe that you obtained that from the Klamath Falls City Police Department that a person was the owner of this vehicle and that you went to his house and you talked to him and that the vehicle was there and that he gave you his birth date and his Social Security number and then gave you a phoney spelling of his name, is that what you want this Jury to believe?

A. I believe I explained my answer, it might aid me if I had my notebook. First of all Mr. Hass's vehicle was registered to Edward C. Pachino Junior of 3429 Summers Lane in Klamath Falls, Oregon and at 7:50 I contacted this address and found out that Mr. Pachino had moved and at 7:57 I contacted—through my investigation that Mr. Pachino had sold his car to William Hass and the vehicle was not registered to Mr. Hass.

Q. Show me in what part of your notes your [*sic*] using to refresh your recollection?

A. Certainly, here's where it is, registered to Edward C.

[120]

Pachino Junior, 7:50, 3429 Summers Lane and this is where I contacted this party and was advised the following—

Q. Kindley [*sic*] tell us how you spelled that name?

A. Hass.

Q. Now, was this notebook written step by step or something where you went back—

A. Step by step.

Q. So, you had the boys [*sic*] name prior to going out to the house and talking to him, didn't you?

A. I had a different version of his name, yes.

Q. Prior to going out to the house and talking to him, what was the different version of his name?

A. To the spelling of the last name, the person I just referred to in the notebook only knew his last name as Bill Hass, Hass.

Q. And what was the other name that you knew him as?

A. The other spelling was Haas.

Q. And from whom did you obtain that?

A. Could I see my notebook?

Q. The question was before you went out to talk to Bill Hass?

A. Yes.

Q. Did you have two spellings of the name then?

A. Yes.

Q. From whom did you obtain the first spelling, Haas?

A. I believe that was from the Klamath Falls City Police

[121]

Department.

Q. Okay, so, the Defendant here spelled the name wrong and you just happened to spell it the same way wrong that the Klamath Falls City Police had spelled it wrong prior to talking to him?

A. Yes.

Q. Did he in fact hand you this when you asked for his identification?

A. I don't recognize it.

Q. Have you looked at it enough to know whether you actually recognize it or not?

A. Yes, it has his name on it, it's a draft card.

Q. Did he hand you this piece of paper when you were out at the house when he gave you his Social Security number?

A. I don't remember.

Q. Now, I'm going to read this and ask you if you told the Defendant these words "if you cannot afford to hire an attorney one will be appointed to represent you before any questioning if you wish one, do you understand that," his answer "yes," "if you give a statement

you can stop talking at anytime you wish, do you understand that," and he said "yes," "having these rights in mind, do you wish to talk to us now," and his answer was "yes," were these questions asked him?

A. Yes.

[122]

Q. Did you tell him that at anytime [*sic*] he wished he could stop and have his attorney present during any statement?

A. Not in those exact words, only what's on the advice of rights card.

Q. Then, after he told you he was in bad trouble and wanted an attorney you went ahead and got everything that you could before you let him talk to an attorney?

A. No, sir.

MR. McKEEN: I would ask that the report of the arrest of the Oregon State Police signed by this Witness be admitted into evidence as pertains to the spelling of the name, the writing on the back I would agree that either could be left there or stricken.

Q. Did the Defendant come across and tell you his real name was Hass?

A. I believe we got it straightened out down at the jail.

Q. Was it then that you charged him under the name of Haas?

A. Did I charge him under that name?

MR. McKEEN: I would ask the Court to take judicial knowledge of the fact that the Defendant's name is spelled wrong.

THE COURT: The Court will take judicial notice that the Defendant's name in the indictment is spelled Haas if that would assist you.

MR. McKEEN: Q. Why did you charge him with that name after

[123]

you had gotten it straightened out?

A. I don't recall.

MR. McKEEN: Could I have this marked?

(Defendant's exhibit 'B' marked for identification)

MR. CRANE: No objection.

THE COURT: Your [*sic*] offering exhibit 'B'?

MR. McKEEN: Yes.

THE COURT: Exhibit 'B' is received.

MR. McKEEN: Q. Didn't you put in your report that Patrick Lee and William Hass were the ones that identified the residence?

A. Yes.

Q. Since there was both of them there why did you just testify that it was this Defendant?

A. Mr. Hass positively identified the residence and then Mr. Lee after looking them over then he would identify them.

Q. He's the one that just said "yeah," but this boy is the one that pointed them out to you?

A. I don't recall that.

Q. Anyway, your report was written closer to the time, that time, was it not?

A. Yes.

Q. At that time you wrote that Patrick Lee and William Haas, Haas had identified these residences from which they had stolen the bicycles? Now, it was William Hass, correct?

[124]

A. What's your question?

MR. McKEEN: That's all I have.

REDIRECT EXAMINATION

BY MR. CRANE:

Q. Who identified the residence first?

A. Mr. Hass.

Q. And then what was Mr. Lee's part in that?

A. He identified them, you know, he had some difficulty until Mr. Hass actually pointed them and then once he got to looking at them then he recognized it and knew the area.

MR. CRANE: That's all I have.

RECROSS EXAMINATION

BY MR. McKEEN:

Q. You didn't see any importance in putting that down in your report?

A. No, sir.

MR. McKEEN: That's all I have.

THE COURT: You may step down, Officer.

MR. CRANE: The State would rest it's [*sic*] rebuttal.

THE COURT: Is the Defendant seeking to have the instructions to the Jury on the use of this?

MR. McKEEN: Yes, I would like the Jury instructed that this statement was admitted only for the use of impeachment purposes.

THE COURT: Members of the Jury, the portion of Officer

[125]

Osterholme's testimony describing the statement made by the Defendant Hass to him during this last time that the Officer was on the stand may not be used by you as proof of the Defendant's guilt, in other words, as substitutive [*sic*] evidence of the crime but you may consider that testimony only as it bears on the crediability [*sic*] of the Defendant as a witness when he testified on the witness stand. Anything further?

MR. McKEEN: I do have one short matter that I would like to take up with the Court out of the presence of the Jury as to further instruction on this point.

THE COURT: Do you mean that the Court rule that it was inadmissible as direct evidence?

MR. McKEEN: Yes.

THE COURT: Members of the Jury, there was a hearing out of your presence in which the Court ruled

that the statement of the Defendant to Officer Osterholme when they were going up to Moyina area—to the Moyina area for the purpose of locating the residences were [*sic*] inadmissible as direct evidence and the Court excludes them under the appropriate rule.

MR. CRANE: I didn't understand that, Your Honor?

THE COURT: The rule is that you may not use that testimony as substitutive [*sic*] evidence of guilt but it is admissible as it bears on the credibility of the Defendant as a Witness

[126]

when he testified on the witness stand.

MR. McKEEN: I do have one witness on sir rebuttal [*sic*].

THE COURT: Proceed.

MR. McKEEN: I would recall the Defendant.

(William Robert Hass having previously been sworn resumed the witness stand)

DIRECT EXAMINATION

BY MR. McKEEN:

Q. Did you give the Officer a misspelled name for any reason during this incident?

A. Never.

Q. You heard him testify that you did?

A. When he gave me my rights he asked me for identification and I gave him my draft card.

Q. And is your name spelled correctly on it?

A. Yes.

Q. And did you give your right Social Security number?

A. Yes.

Q. And your birthday?

A. Yes, May 24, 1950.

Q. The Officer said that he took you out to these places and you pointed out the houses, is that correct?

A. That's wrong.

Q. What happened out there?

A. He just took me up to the place and I was handcuffed and

[127]

they took us up to the door and they had us identified and they didn't identify me, they said Pat Lee was the guy.

Q. Okay, he took you up to the door and they identified Pat Lee and you were there too, is that correct?

A. Yes.

Q. Did the Officer make any attempt at all to have you show what house it was?

A. No.

Q. Did he make any attempt to have Pat Lee show what house it was?

A. No.

MR. McKEEN: That's all I have.

CROSS EXAMINATION

BY MR. CRANE:

Q. When you got back in the car where did you go?

A. With the Officer?

Q. After Mr. Lehman identified Lee?

A. Went around the corner and there was a house there that he took us to.

Q. He just pulled up to the house?

A. Uh huh.

Q. And did Lee tell him where it was?

A. No.

Q. Did you know?

[128]

A. No.

MR. CRANE: That's all I have.

MR. McKEEN: No further questions.

THE COURT: You may step down.

* * * * *

OPINION OF OREGON COURT OF APPEALS

[Opinion set forth in full as Appendix C, pages 20-25 of the printed petition for a writ of certiorari.]

OPINION OF OREGON SUPREME COURT

[Opinion set forth in full as Appendix A, pages 12-18 of the printed petition for a writ of certiorari.]

JUDGMENT OF OREGON SUPREME COURT

[Judgment set forth in full as Appendix B, page 19 of the printed petition for a writ of certiorari.]

Supreme Court, U. S.
FILED
JUN 10 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

RESPONSE TO WRIT OF CERTIORARI IN THE SUPREME COURT OF THE STATE OF OREGON

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Respondent, William Robert Hass, contends that the Supreme Court of the United States has no jurisdiction to review the final Order of the highest Court of the State, under 28 USC Section 1257, subsection 3.

STATEMENT OF THE CASE

The Respondent accepts the statement of the case as set out by the Petitioner as being accurate.

REASONS FOR DENYING THE WRIT

In order for the Supreme Court to review the

judgment of the highest Court of the State of Oregon, the Petitioner would necessarily have to be one to whom the statute or constitutional provision applies and who was adversely affected by its interpretation. The State of Oregon has raised constitutional provisions that are designed to protect the defendant in criminal cases and have raised their construction by the Oregon Supreme Court as the basis for jurisdiction in the Supreme Court of the United States. This is contrary to the principal set out in Voeller vs. Neilspon Warehouse Company, 61 S. Ct. 376, 311 U.S. 531, 85 L. Ed. 322.

The constitutional provisions that are declared by the Petitioner to be the basis of their Writ of Certiorari are as follows:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

Said provision clearly protects the defendant in a criminal case and there is nothing in Petitioner's brief that would indicate that the State of Oregon was ever compelled in any criminal case to be a witness against themselves, nor was there anything in said brief to indicate that the State of Oregon was ever deprived

of life, liberty or property without due process of law unless they would feel that a conviction in a Circuit Court gives them some property right or interest in a criminal defendant. Such a construction is not within the realm of reason.

The other constitutional provision provides,

> "nor shall any state deprive any person of life, liberty or property without due process of law."

Again, there is nothing in Petitioner's brief that would in any way indicate that the State of Oregon (even if the State of Oregon could be construed as a person) was denied any life, liberty or property without due process of law since the decision was rendered in the highest court in Oregon.

The Supreme Court of Oregon has adopted an intrepretation to the confession or admission cases that is more restrictive to the State prosecutor than has been interpreted by the Federal cases (assuming that Petitioner's argument is correct that there is no real difference between the case in issue and the cases presented through past Oregon decisions and recent Federal cases). State vs. Brewton, 247 Or. 241, 422 P 2d. 581 Certiorari denied 387 U.S. 943 (1967; Harris vs. New York, 401 U.S. 222 (1971). This interpreta-

tion by the Oregon Supreme Court should in no way subject the defendant to the jurisdiction of the Supreme Court of the United States since there has been no showing that the decision is repugnant to the Constitution of the United States or that there is any injured party involved in the Writ of Certiorari.

For those reasons the Writ of Certiorari should be denied.

Respectfully submitted,

June, 1974

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing and remanding Hass's burglary conviction (Petition for Certiorari, at 20-25) is reported at 13 Or. App. 368, 510 P.2d 852 (1973). The opinion of the Supreme Court of the State of Oregon affirming the decision of the court of appeals (Petition for Certiorari, at 12-18) is reported at 267 Or. 489, 517 P.2d 671 (1973).

JURISDICTION

The decision of the Supreme Court of the State of Oregon was filed on December 31, 1973. Pursuant to Rule 22 (1), the petition for a writ of certiorari was filed within 90 days of that date, on March 29, 1974.

Certiorari was granted on October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

QUESTION PRESENTED

Notwithstanding this Court's decision in *Harris v. New York*, 401 U.S. 222 (1971), do the Fifth and Fourteenth Amendments prevent the prosecution from impeaching a criminal defendant's trial testimony with prior inconsistent statements made after the defendant has been advised of his *Miranda*[1] rights and has expressed a desire to talk to an attorney, but which are not otherwise claimed to be involuntary or untrustworthy?

STATEMENT OF THE CASE

A. General Background

Hass was convicted upon trial by jury of a burglary in the first degree (Oregon Revised Statutes 164.225),[2]

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] ORS 164.215. "(1) A person commits the crime of burglary in the second degree if he enters or remains unlawfully in a building with intent to commit a crime therein.

(Continued on next page)

which involved the stealing of a bicycle from the garage of a residence in Klamath Falls, Oregon. He appealed his conviction to the Oregon court of appeals, which decided three of the four issues raised adversely to Hass, but reversed the judgment on the ground that certain statements Hass made to a police officer were improperly used to impeach his trial testimony (Petition for Certiorari, at 20-25). Upon the State's petition for review, the Oregon supreme court affirmed the decision of the court of appeals (Petition for Certiorari, at 12-18).

B. Facts Material to the Question Presented

On the day of the burglary, officer Osterholme of the Oregon State Police talked to Hass about the theft of the bicycle taken therein, after advising him of his *Miranda* rights (Tr. 45-46, 50-51; A. 3-5, 9-10). Hass admitted that he had taken two bicycles that day, and was not sure, at first, which bicycle Osterholme was talking about (Tr. 52; A. 10). He stated that he had given one of the two bicycles back and agreed to show Osterholme where he had concealed the other (Tr. 53-54; A. 11-12).

At some point on the trip to the spot where the second bicycle was concealed, Hass, who had been placed under arrest by this time, indicated that he realized he was in trouble and asked Osterholme if he could contact an attorney (Tr. 54, 56; A. 13, 15). Osterholme

(Continued from preceding page)

"(2) Burglary in the second degree is a Class C felony."

ORS 164.225. "(1) A person commits the crime of burglary in the first degree if he violates ORS 164.215 and the building is a dwelling . . . .

"(2) Burglary in the first degree is a Class A felony."

testified that the question was asked under the following circumstances:

> "It was approximately—I would say a mile away from Washburn Way, possibly in that area when he made the statement, he said 'gee, I know I'm in a lot of trouble,' and then later he said 'do you think I could phone later,' or something like that to which I replied 'Yes, that we would make a phone available to him as soon as we got to the station.'
>
> * * * * *
>
> "Then he asked me 'do I have to show you where this bike is,' and I said 'no, we're not going to force you too [*sic*], however, we would like to get this cleared up tonight,' at which time he thought for a minute and then did go to where the bike was." (Tr. 62-63; A. 22).

Hass testified that what transpired was as follows:

> "Well, I just figured out that I was in a lot of trouble and I said that I wanted to see a lawyer and he said 'well, I can't let you do that,' and so then he says 'I'll let you when we get to the station' and then we went down—I don't know exactly the road but we went down this road and fished out the bike." (Tr. 66; A. 25-26).

Osterholme also indicated that after they had found the bicycle in question, Hass pointed out to him the homes from which the two bicycles had been taken (Tr. 59-60, 67-68; A. 18-19, 27).

After hearing testimony concerning these events *in camera*, the trial court ruled that the things Hass did and said prior to the time he inquired about the availability of counsel were admissible in the State's case-in-chief, but that Hass's inquiry constituted a request for

counsel and that anything he did or said thereafter was inadmissible (Tr. 70; A. 29). Accordingly, Osterholme testified in the State's case-in-chief only that Hass had admitted that he and Patrick Lee had taken two bicycles on the day in question because he had needed money, that he had given one bicycle back, and that the other bicycle was also subsequently recovered (Tr. 72-73; A. 31-32).

Hass then testified in his own behalf that he, Pat Lee, and Bill Walker had been driving around the area where the bicycles were taken, that Lee and Walker had taken the bicycles without his prior knowledge, that he did not know the exact location of the residences from which the bicycles had been taken, and that he knew only that the bicycles "came out of the area—you know, where I left Pat and Bill off" (Tr. 90-91, 95-96, 99, 109; A. 44, 48-50, 53, 63). In short, he admitted taking part in the subsequent concealment of the bicycles, and thus admitted his guilt of the crime of theft by receiving (Oregon Revised Statutes 164.095),[3] but claimed that he had had no part in the burglary with which he was charged.[4]

---

[3] ORS 164.095. "(1) A person commits theft by receiving if he receives, conceals or disposes of property of another knowing or having good reason to know that the property was the subject of theft.

"(2) 'Receiving' means acquiring possession, control or title, or lending on the security of the property."

[4] Had the jury believed Hass's testimony and acquitted him of the burglary charge, it is doubtful that the State would have been able to reprosecute him for the theft of which he admitted his guilt, since the Oregon supreme court had adopted the "same-transaction" test for determining when jeopardy attaches several months before Hass's trial. *State v. Brown*, 262 Or. 442, 497 P.2d 1191 (1972). But *cf. State v. Ayers*, 98 Or. Adv. Sh. 1528, 16 Or. App. 177, 517 P.2d 1224 (1974).

In rebuttal, the State recalled officer Osterholme, who testified, over Hass's prior constitutional objections, that after he had obtained the admissions about which he had previously testified, he had taken Hass to the area where the two bicycles had been stolen, and that Hass had pointed out the houses from which they had been taken (Tr. 111-112; A. 64-65). The court then instructed the jury that this testimony was received only for purposes of impeachment (Tr. 124-126; A. 79-80). On surrebuttal, Hass denied that he had pointed out the residences in question (Tr. 126-127; A. 81).[1]

SUMMARY OF ARGUMENT

In this case, Hass testified on direct examination in a manner inconsistent with previous statements to the police which he had made after he had been properly advised of his constitutional rights and had inquired about the availability of counsel, but which were not claimed to have been coerced or involuntary in any other respect. On rebuttal, the prosecution presented evidence of those prior statements, and the trial court instructed the jury that they were received solely for their bearing on Hass's credibility.

[1] It may be noted in passing that the prosecutor did not lay a formal foundation for impeaching Hass by prior inconsistent statement, in that he did not inquire during his cross-examination of Hass whether, contrary to Hass's testimony that he did not know the exact location of the residences from which the bicycles were taken, he had not, in fact, pointed them out to officer Osterholme. However, defense counsel at no time objected to the proposed impeachment on this basis and thus failed to preserve any potential error. *Cf. Hill v. California*, 401 U.S. 797, 805-806 (1971) (admissibility of incriminating diary pages not raised in state court). Moreover, this procedural irregularity is clearly harmless in the context of this case, since Hass and his attorney not only knew at the time Hass took the stand, as a result of the earlier *in camera* hearing, that Osterholme was prepared to testify in a manner inconsistent with Hass's testimony, but also insisted on surrebuttal that Osterholme's testimony was false. And in any event, this irregularity is not one of constitutional dimensions.

The present case is thus identical in all material respects with *Harris v. New York*, 401 U.S. 222 (1971), which has been adopted and followed by the majority of the states since it was decided. The distinction which the Oregon supreme court drew herein between cases in which the defendant is advised of his rights improperly, or not at all, and cases in which the defendant attempts to invoke his rights does not require a different result in this case, because (1) in either situation, the effect of holding statements inconsistent with trial testimony inadmissible for impeachment purposes is to pervert the constitutional right to testify or not to testify into a constitutional right to commit perjury, and (2) the traditional standards of voluntariness and trustworthiness can be invoked to deter improper police conduct, when and if necessary.

ARGUMENT

In *Harris v. New York*, 401 U.S. 222 (1971), this Court held that statements of a criminal defendant which would be admissible in the prosecution's case-in-chief, but for the failure of the police to comply with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used to impeach the testimony of a defendant who takes the stand and testifies in a manner contrary to his prior statements. The Court said that, notwithstanding certain broad language in the *Miranda* opinion:

> "It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of

course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

As Mr. Justice Brennan noted in his dissenting opinion,[6] after *Miranda* was decided, only a minority of appellate courts, undeterred by the broad language therein which *Harris* declared to be dictum, held that statements inadmissible in the prosecution's case-in-chief might nevertheless be admissible for impeachment purposes.[7] Since *Harris* was decided, however, the majority of states in which similar questions have arisen have adopted its reasoning, with many of them overruling their prior contrary decisions in the process.[8] Two states have held, on grounds of state law, that *Harris* is not generally

[6] 401 U.S. at 231 n. 4.

[7] See *State v. Jackson*, 201 Kan. 795, 443 P.2d 279 (1968), cert. denied 394 U.S. 908 (1969); *State v. Kimbrough*, 109 N.J. Super. 57, 262 A.2d 232 (1970); *People v. Kulis*, 18 N.Y.2d 318, 274 N.Y.S.2d 873, 221 N.E.2d 541 (1966); *State v. Butler*, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969). *Cf. People v. La Batt*, 108 Ill. App. 2d 18, 246 N.E.2d 845 (1969), cert. denied 401 U.S. 963 (1971); *State v. Grant*, 77 Wash. 2d 47, 459 P.2d 639 (1969) (impeachment of witness: inadmissibility of statement in witness's prosecution assumed).

[8] See, *e.g.*, *State v. Johnson*, 109 Ariz. 70, 505 P.2d 241 (1973); *Rooks v. State*, 250 Ark. 571, 466 S.W.2d 478 (1971); *People v. Nudd*, — Cal. 3d —, 115 Cal. Rptr. 372, 524 P.2d 844 (1974); *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971); *Williams v. State*, 301 A.2d 88 (Del. 1973); *State v. Retherford*, 270 So. 2d 363 (Fla.), cert. denied 412 U.S. 953 (1973); *Campbell v. State*, 231 Ga. 69, 200 S.E.2d 690 (1973); *People v. Moore*, 54 Ill. 2d 33, 294 N.E. 2d 297, cert. denied 412 U.S. 943 (1973); *Davis v. State*, 257 Ind. 46, 271 N.E.2d 893 (1971); *Sabatini v. State*, 14 Md. App. 431, 287 A.2d 511 (1972); *Commonwealth v. Harris*, — Mass. —, 303 N.E.2d 115 (1973); *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, cert. denied 409 U.S. 995 (1972); *State v. Kish*, 28 Utah 2d 430, 503 P.2d 1208 (1972) (implied: defendant did not testify after being told he could be impeached); *Riddell v. Rhay*, 78 Wash. 2d 248, 484 P.2d 907, cert. denied 404 U.S. 974 (1971); *Ameen v. State*, 51 Wis. 2d 175, 186 N.W.2d 206 (1971). *Cf. State v. Vega*, 163 Conn. 304, 306 A.2d 855 (1972) (statements made on pretrial motion to suppress evidence); *Crain v. Commonwealth*, 484 S.W.2d 839 (Ky. 1972) (letters written to prosecutor); *State v. Gervais*, 317 A.2d 796 (Me. 1974) (conviction of crime pending on appeal); *State v. Bea*,

(Continued on next page)

applicable in that state.[9] And two jurisdictions have refused to extend the applicability of *Harris* to readily distinguishable fact situations.[10]

In addition, two states have restricted—in our view erroneously—the holding of *Harris*, while acknowledging, however reluctantly, that it states the law applicable to its precise facts: Pennsylvania[11] and Oregon, in the present case.[12] We submit that the case at bar presents

(Continued from preceding page)

509 S.W.2d 474 (Mo. App. 1974) (statement suppressed for failure to disclose to defense); *State v. Iverson*, 187 N.W. 1 (N.D.), cert. denied 404 U.S. 956 (1971) (statements made at State's Attorney's Inquiry, without prior *Miranda* wrnings); *Trowbridge v. State*, 502 P.2d 495 (Okla. Cr. 1972) (physical evidence seized in warrantless search); *Kelley v. State*, — Tenn. Cr. —, 478 S.W.2d 73 (1972) (defendants' silence used to impeach exculpatory testimony).

[9] *State v. Santiago*, 53 Haw. 254, 492 P.2d 657, 662-665 (1971) (Hawaii Constitution prevents impeachment by statements inadmissible for substantive purposes); *State v. Butler*, 493 S.W.2d 190, 197-198 (Tex. Cr. 1973) (state statute requiring advice of rights prevents use of statements obtained in violation thereof for impeachment.

[10] *Alesi v. Craven*, 440 F.2d 795 (9th Cir.), cert. denied 404 U.S. 856 (1971) (statements made under actually coercive circumstances not admissible for impeachment); *People v. Bobo*, 390 Mich. 355, 212 N.W.2d 190 (1973) (fact that accused remained silent when confronted by police not admissible for impeachment).

[11] *Commonwealth v. Horner*, 453 Pa. 435, 309 A.2d 552, 555 (1973) (*Harris* inapplicable to testimony given at preliminary hearing). See also *Commonwealth v. Woods*, 455 Pa. 1, 312 A.2d 357, 358 (1973) (defendant's pretrial statements held not inconsistent with trial testimony).

[12] *Cf. State v. Florance*, 99 Or. Adv Sh 1997, 2007, — Or —, 527 P.2d — (1974), in which the Oregon supreme court followed the interpretation of the Fourth Amendment enunciated in *United States v. Robinson*, 414 U.S. 218 (1973), but stated, in the course of its opinion:

> "If we choose we can continue to apply this [earlier] interpretation [of the law of search and seizure]. We can do so by interpreting Article I, § 9, of the Oregon constitutional prohibition of unreasonable searches and seizures as being more restrictive than the Fourth Amendment of the federal constitution. *Or we can interpret the Fourth Amendment more restrictively than intrepreted by the United States Supreme Court.*" [emphasis added].

Cooper v. California, 386 U.S. 58, 62 (1967), impiles, if it does not hold, that the emphasized sentence is not correct.

a fact situation identical in all material respects to that which was before the Court in *Harris*, notwithstanding the attempt of the Oregon supreme court to distinguish the two.

In the first place, here, as in *Harris*, the testimony of the defendant which the prosecution sought to impeach was given on direct examination and in this case, was also given after the defense knew that testimony to the contrary had been ruled inadmissible in the prosecution's case-in-chief. Hence, the Court is not here dealing with the question, posed hypothetically by some critics of the *Harris* decision,[8] of whether *Harris* applies with equal force to cases in which the defendant does not initially present testimony contrary to his previous statements, but is simply exposed to cross-examination which brings out the inconsistency. This is not, then, a case of a criminal defendant whose decision whether or not to take the stand is improperly influenced by the fear of being impeached as to matters beyond the scope of his direct examination. It is a case of a criminal defendant attempting to use "[t]he shield provided by Miranda" as "a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris v. New York*, 401 U.S. at 226. We submit that the constitutional right to testify or not testify in one's own behalf is not thus to be converted into a constitutional right to lie. See *United States v. Kahan*, 415 U.S. 239, 245 (1974).

[8] See, *e.g.*, Note, 32 La. L. Rev. 650, 655 (1972).

Secondly, here, as in *Harris*, the defendant made no claim that his statements to the police were, in fact, coerced or involuntary. To the contrary, it is undisputed that Hass readily admitted his involvement in the crime under investigation after being fully advised of his *Miranda* rights. Hass claims only that his later inquiry about the availability of counsel rendered inadmissible anything he did or said thereafter. He acknowledges that he was told that he could contact an attorney when he reached the police station,[9] and he does not claim that he was thereafter compelled to continue to assist in the police investigation.

Hence, the statements challenged in this case were obtained under circumstances which satisfy pre-*Miranda* standards of voluntariness and trustworthiness. The mere fact that an accused inquires about the availability of counsel does not automatically render his subsequent statements inadmissible under those standards. *Frazier v. Cupp*, 394 U.S. 731, 737-739 (1969).

Thirdly, here, as in *Harris*, the jury was carefully instructed that the evidence concerning the challenged statements was to be considered only for its bearing on the credibility of the defendant as a witness, and not as proof of his guilt. The jury may be presumed to have understood and followed that instruction. See *Harris v. New York*, 401 U.S. at 223. *Cf. Frazier v. Cupp*, 394

[9] Indeed, it is not clear that advice of constitutional rights which tells the accused that counsel will be made available at a later time (*e.g.*, "when and if you go to court") renders statements subsequently given inadmissible in the prosecution's case-in-chief. See the cases collected in Mr. Justice Douglas's dissent from the denial of certiorari in *Wright v. North Carolina*, 415 U.S. 936 (1974).

U.S. 731, 735-736 (1969) (instruction that statements of counsel are not substantive evidence). But *cf. Bruton v. United States*, 391 U.S. 123, 127-130 (1968) (instruction to disregard substantive evidence with respect to one of two jointly-tried defendants).

In the present case, the Oregon supreme court distinguished between cases like *Harris*, in which the defendant is not properly advised of his right to counsel, and those like the one at bar, in which he is properly advised but is not immediately given an attorney when he inquires about the availability of counsel. See 267 Or. at 492-493, 517 P.2d at 673, Petition for Certiorari at 15-16). This distinction should not be held to require a different result in this case.

As the Court noted in *Harris*, the possibility that impermissible police conduct will be encouraged by permitting the use, for impeachment purposes, of statements which are inadmissible in the prosecution's case-in-chief is, at best, speculative. 401 U.S. at 225. The alleged misconduct which occurred in this case, for example, is, at most, only a minor deviation from the requirements of *Miranda*, with which the police were clearly trying to comply. Total suppression, even for impeachment purposes, of statements obtained under such circumstances is not necessary as a prophylactic measure. The traditional standards of voluntariness and trustworthiness remain viable and can be invoked to prevent all use of statements obtained under circumstances involving actual coercion or untrustworthiness, when and if such exclusion is necessary; and they are sufficient for this

purpose. See, *e.g.*, *Alesi v. Craven*, 440 F.2d 975 (9th Cir.), cert. denied 404 U.S. 856 (1971).

It is perhaps for the foregoing reasons that other cases similar to the one at bar have uniformly not recognized the distinction made by the Oregon supreme court in this case, and have held *Harris* applicable, regardless of whether the accused is improperly advised of his rights or whether, after being properly advised, he declines to waive them. See *United States ex rel. Wright v. La Vallee*, 471 F.2d 123, 125 (2d Cir 1972), cert. denied 414 U.S. 867 (1973) (decided under *Escobedo*[8] standards: that defendant requested and was denied counsel assumed); *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 113, cert. denied 409 U.S. 995 (1972) defendant apparently warned, but did not waive counsel). *Cf. People v. Nudd*, — Cal. 3d —, 115 Cal. Rptr. 372, 524 P.2d 844 (1974) (defendant questioned "off the record" after refusing to make statement); *Colbert v. State*, 124 Ga. App. 283, 183 S.E.2d 476, 478-479 (1971) (defendant claimed to have requested counsel: reversed because court did not limit statements solely to impeachment); *People v. Hooks*, 14 Ill. App. 3d 89, 302 N.E.2d 241, 243 (1973) (that defendant was told he would not be given counsel until court appearance assumed);[9] *Davis v. State*, 257 Ind. 46, 271 N.E.2d 893, 895 (1971) (defendant willing to talk, but also wanted to contact attorney: court's striking of impeachment testimony characterized as erroneous).

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[8] *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[9] See Note 14, *supra*.

CONCLUSION

For the above reasons, the judgment of the Supreme Court of the State of Oregon should be reversed and this cause remanded for the proceedings necessary for the Oregon courts to cause the judgment of the trial court to be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor

be deprived of life, liberty or property, without due process of law . . ."

United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

United States Constitution, Amendment XIV, Section 1:

"... (N) or shall any State deprive any person of life, liberty, or property, without due process of law. . ."

Constitution of Oregon, Article 1, Section 10:

"No Court shall be secret but justice shall be administered openly and without purchase completely and without delay and every man shall have remedy by due course of law for injury done him in his person, property or reputation."

Constitution of Oregon, Article 1, Section 12:

"No person shall be put in jeopardy twice for the same offense nor be compelled in any criminal prosecution to testify against himself."

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1452

STATE OF OREGON,

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v.

WILLIAM ROBERT HASS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing and remanding Hass's burglary conviction (Petition for Certiorari, at 20-25) is reported at 13 Or. App. 368, 510 P.2d 852 (1973). The opinion of the Supreme Court of the State of Oregon affirming the decision of the court of appeals.

QUESTIONS PRESENTED

Question One

Does the Supreme Court of the United States have the power to compel a state to conform to federal law when state law is more restrictive against the prosecution than federal law?

Question Two

Is a mandate from the highest appellate court in the state in favor of a criminal defendant reviewable upon appeal by the state to the Supreme Court of the United States?

Question Three

May a state court allow a confession not admissible under the states case-in-chief to be excluded for impeachment purposes notwithstanding **Harris v. New York, 401 U.S. 222 (1971).**

STATEMENT OF THE CASE

Respondent accepts Appellant's Statement of the Case and Facts Materials to the Question Presented.

SUMMARY OF ARGUMENT OF QUESTION ONE

Even Courts that have overruled state laws and followed **United States v. Robinson,** 414 U.S. 218 (1973) and **Harris,** supra, have included verbage in their opinions that it is being done through "tradition", through "reasons of policy" or in order to end "confusion between state and federal law". Hawaii has rejected **Harris** and stated that Hawaii is not bound by the federal interpretation in areas where the state

interpretation is more restrictive. The Supreme Court of the United States has recognized such a principal as being valid in **Cooper v. California,** supra. The Supreme Court of the United States is therefore without power to review the decision of the Oregon Supreme Court in the instant case since there has been no federally protected right violated.

SUMMARY OF ARGUMENT OF QUESTION TWO

The State of Oregon has no standing to cause review of constitutional provisions, since the state is not a person whose rights are adversely affected by the operation of the mandate of the Supreme Court of the State of Oregon, nor is the State of Oregon claiming any deprivation of its rights under the Fifth or Fourteenth Amendment, but is seeking an abstract, academic opinion.

SUMMARY OF ARGUMENT OF QUESTION THREE

The opinion of the State of Oregon in **State v. Hass,** 13 Or. App. 368, 510 P.2d 852 (1973) properly distinguishes the facts from those in **Harris v. New York,** 401 U.S. 222 (1971).

ARGUMENT OF QUESTION ONE

The Supreme Court of the United States has held

that the states have power to impose higher standards on searches and seizures than required by the Federal Constitution. In **Cooper v. California,** 386 U.S. 58, 17 LEd 2nd 730, 87 S Ct. 788 the police had violated a state law regarding search and seizure. The California Supreme Court had held that such violation was harmless error under the California "hold-harmless statute". The Supreme Court of the United States determined the case solely on the propriety of the search under the Federal Constitution and held that a violation of a state statute would not be reviewable by the Supreme Court of the United States unless the conduct in the search itself was unreasonable under federal law. In arriving at this decision the high court in its majority opinion included the following language,

> "Our holding, of course, does not affect the states power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so, and when such state standard alone has been violated, the state is free without review by us, to apply its own state's harmless error rule to such errors of state law. There being no Federal Constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless error rule".

See also **Sibron v. New York,** 392 U.S. 40, 61, 20

LEd 2d 917, 88 S Ct 1889 (1967). The Oregon Supreme Court commented upon this rule in **State v. Florance,** 99 Or. Adv. Sh. 1997, 2007, 2008, 2009, with the following language,

> "If we choose, we can continue to apply this interpretation. We can do so by interpreting Article I, Section 9 of the Oregon Constitution Prohibition of Unreasonable Searches and Seizures as being more restrictive than the fourth amendment of the Federal Constitution, or we can interpret the fourth amendment more restrictively than interpreted by the United States Supreme Court."

In the **Florance** case the Supreme Court of Oregon overruled their previous decisions and followed the federal rule as set out in the **Robinson** case, supra, but gave reasons of policy for doing so,

> "The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges * * *".
>
> "It is important for the guidance of law officers that the rule be as clear and simple as may be reasonably possible consistent with the constitutional rights of the individual".
>
> "Not adopting the rule of Robinson would add further confusion in that there would then be an Oregon rule and a federal rule. Federal and state law officers frequently work together and in many instances do not know whether their efforts will

result in federal or state prosecution or both. In these instances two different rules would cause confusion."

Although the Oregon Supreme Court distinguished the present case from the **Harris** decision, **Harris v. New York,** 401 U.S. 222 (1971), they nevertheless were free to so rule without review by the Supreme Court of the United States so long as the rule propounded by them was equal or more restrictive to the prosecution, as it certainly was, than the federal law requires, and so long as its decision was based upon reasonable arguable grounds. Those reasonable arguable grounds have been expressed by the Supreme Court of the United States in the dissenting opinion of the **Harris** case and in the majority opinion in **State v. Brewton,** 247 Or. 241, 422 P.2d 581, cert. denied 387 U.S. 943 (1967).

In **Ker v. California,** 374 U.S. 23, 10 LEd 2d 726, 83 S Ct, 1623, the following language appears,

> "The states are not thereby precluded from developing workable rules governing arrest, searches and seizures to meet the practical demands of effective criminal investigation of law enforcement in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible

> against one who has standing to complain. Such a standard implies no derigation of uniformity in applying federal constitutional guarantees, but is only a recognition that conditions and circumstances vary, just as do investigative and enforcement techniques".

The State of Hawaii, whose Supreme Court refused to accept the **Robinson** decision in **State v. Kaluna,** ———**Haw**———, 520 P.2d, 51, 58 (1974) used the following language in the **Kaluna** case,

> "However as the ultimate judicial tribunal in this state, this court has final unreviewable authority to interpret and enforce the Hawaiian Constitution. We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those texually parallel provisions in the Federal Bill of Rights when logic and the sound regard for the purposes of those protections have so warranted."

The **Kaluna** case was a search and seizure case where the State Constitution of Hawaii required in addition to the federal rules, that there be no governmental intrusions into the personal privacy of citizens. A violation of this provision of Hawaii Law in a search that may have been otherwise reasonable and in all respects reasonable under the **Robinson** case, was nevertheless reversed by the Hawaii Supreme Court with the explanation above. In **State v. Santiago,** 53 Haw. 254, 263, P.2d 657, 662 (1971) the following

language appears,

> "However this Court is the final arbiter of the meaning of the provisions of the Hawaii Constitution. Nothing prevents our constitutional drafters from fashioning greater protections for criminal defendants than those given by the United States Constitution, State v. Texeria, 40 Haw. 138, 142, 433 P.2d 593, 597 (1967)".

In the **Santiago** case the Supreme Court of Hawaii rejected the rule of **Harris** and held that confessions not admissible in the states case-in-chief due to inadequacies of **Miranda** warnings may not be used for impeachment. purposes.

In **People v. Norman,** 112 Cal. Rptr. 43, 49, 50, the following language appears,

> "So long as the state statutory or constitutional limitation on search is as strict or stricter than that imposed by the Fourth Amendment, no question of violation of Fourteenth Amendment rights can arise."

In **People v. Kelley,** Misc. 353 N.Y. S.2d, 111, 117 (1974) the following language appears,

> "It appears therefore that the Court of Appeals may not narrow Fourth Amendment protections further than the Supreme Court dictates, but there is no prohibition against the state through its highest appeallate court extending such protection. For these reasons, it is the opinion of this Court that Marsh is not replaced by Gustafson and Robinson and is still the law in New York. The principle of Marsh is fair and reasonable and equitable and was consistent with federal interpretation of the Fourth Amendment prior to Gustafson and Robinson."

Oregon's Constitution, Article I, Section 10, provides as follows:

> "No court shall be secret but justice shall be administered openly and without purchase completely and without delay and every man shall have remedy by due course of law for injury done him in his person, property or reputation".

Oregon's Constitution, Article I, Section 12 provides:

> "No person shall be put in jeopardy twice for the same offense nor be compelled in any criminal prosecution to testify against himself."

In the instant case the Supreme Court of the State of Oregon was well within their Oregon Constitutional interpretation whether or not the present case can be distinguished from that of **Harris v. New York,** supra.

ARGUMENT OF QUESTION TWO

The Bill of Rights protects individuals from wrongful state conduct. The Fourteenth Amendment and Fifth Amendment have been raised in this case by the State, who have requested in their Brief that the judg-

ment of the Supreme Court of the State of Oregon be reversed by the Supreme Court of the United States and remanded. Research has failed to disclose a single case where certiorari has been granted to the State in such circumstances and numerous cases found, including **Smith v. Indiana,** 191 U.S. 138, have maintained that a person raising a constitutional question in the Supreme Court of the United State must be a person who is personally effected by said interpretation of the State court or statute and must have a personal or real interest involved. In **Smith v. Indiana,** supra, an assessor appealed an adverse finding on a mandamus proceeding that required him to reassess County property. The Supreme Court of the United States held that he was acting in an official capacity under the laws of the state and had no personal interest that would cause him to be a proper party to raise such a question. This was true even though he was assessed costs personally in the original proceeding.

It is a firmly established principal of law that the constitutionality of a statute or ordinance may not be attacked by one whose rights are not adversely affected by the operation of the statute. This rule applies to all cases both at law and in equity and is equally applicable in both civil and criminal proceedings, **see 16**

CJS Constitutional Law, Section 76, and cases cited thereunder.

In **State v. Slusher,** 119 Or 141, 248 P 358, 359, a sheriff was contesting the constitutionality of a state statute and the following language appears,

> "The better doctrine supported by an increasing weight of authority is that a mere subordinate ministerial officer to whom no injury can result and to whom no violation of duty can be imputed by reason of him complying with the statute, will not be allowed to question its constitutionality, but that the constitutionality of the statute may be questioned by an officer who will, if the statute is unconstitutional, violate his duty under his oath of office or otherwise render himself liable by acting under a void statute."

This general rule of proper standing to raise constitutional questions certainly should be applicable in the United States Supreme Court. The appealing party is the State of Oregon through the Attorney General. The constitutional provisions that are being questioned are provisions designed to protect individuals from the State of Oregon. The proper party to such proceedings would, of necessity, be a "person" who is injured or is about to be injured from the state's interpretation.

Since **Georgia v. Stanton** (1867 U.S.) 6 Wall 50,

18 LEd 721, the rule appears to be the states have no general standing before the highest constitutional court to attack laws of the Federal Legislature or to litigate Federal Constitutional issues unless they are protecting their own state property rights that are directly affected by legislation of the congress or by other federal action, by legislative or other action of another state or by private party, see **Antieau Modern Constitutional Law,** page 664, 665, Section 15.25. In **Georgia v. Stanton,** supra, the State of Georgia under Article III of the U. S. Constitution attempted to obtain jurisdiction in the Supreme Court of the United States on a controversy between a state and citizens of another state. The following language of Justice J. S. Black appears in said case,

> "We admit that this Court has no authority to control the action of the legislative and executive departments or to require either of them by any mandate to keep within the limits of the law. No matter how clear it may seem to the judges that an act of congress has been passed which violates the constitution, such an act does not of itself afford any grounds of appeal to this court. We do not therefore, complain that congress has passed an unconstitutional act, but we complain that the defendants in this bill have done and threatened to do certain things injurious to the Plaintiff. If the defendants have not done those things and

> disclaim the intention imputed to them, we will have no case."

See also **Texas v. Interstate Commerce Commission,** 258 U.S. 158, 66 LEd 531, 42 S Ct 261; **New Jersey v. Sargent,** 269 U.S. 328, 70 LEd 289, 46 S Ct 122; **Massachusetts v. Mellon,** 262 U.S. 447, 67 LEd 1078, 43 S Ct 597; **Florida v. Mellon,** 273 U.S. 12, 18, 71 LEd 511, 47 S Ct 265; **New York v. United States,** 326 U.S. 572, 90 LEd 326, 66 S Ct 310 (1946); **Kansas v. Colorado,** 185 U.S. 125, 46 LEd 838, 22 S Ct 552; **Kansas v. Colorado** 206 U.S. 46, 51 LEd 956, 27 S Ct 655; **South Dakota v. North Carolina,** 192 U.S. 286, 48 LEd 448, 24 S Ct 269.

In the **Mellon** case, supra, the Court was concerned as to whether or not the State of Massachusetts had standing as representative of the citizens of the state and the following language appeared,

> "This Court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance or a remedy is not to be had here."

and

> "Ordinarily, at least, the only way in which a state may afford protection to a citizen in such cases is through the enforcement of its own criminal statutes where that is appropriate or by opening

its courts to the injured persons for the maintenance of civil suits or action."

The State has instituted an appeal based on Amendment 5 and 14 as its basis for jurisdiction but the 5th and 14th Amendment of the Constitution of the United States are federal prohibitions against the state itself and run in favor of the criminal defendant. In its Brief, the State has at no point indicated that the State of Oregon was deprived in any of its constitutional rights under the Constitution, nor that the defendant was deprived of any of his constitutional rights under the Constitution, but they are seeking an abstract decision of the Supreme Court that would aid legal scholars to better interpret various federal cases that are in conflict with various state cases. It would appear likely that legal scholars all over the United States are waiting with bated breath for the words of the high court to end the confusion and give them an answer. However, the name of this case is the **State of Oregon v. William Robert Hass,** and it has been contended by the State of Oregon, that William Robert Hass is merely a small town burgler who has no real concern as to the question of power in the Courts or the various interpretations of state and federal cases. He is claiming no abuse by the state court, no violatoin of any of his constitutional rights

and, in fact, is blissfully contented to accept the final mandate of the highest court of the State of Oregon. To use his rights under the Fifth Amendment and the Fourteenth Amendment as a basis to reinstate his conviction is beyond the scope of the Supreme Court's jurisdiction, or in the very least violates the abstention doctrine noted in the **Sibron** case and explained in **Railroad Commission v. Pullman Co.**, 312 U.S. 496, 85 LEd 971, 61 S Ct 643 (1941).

ARGUMENT OF QUESTION THREE

The respondent would incorporate as its argument the opinion of the Supreme Court of Oregon differentiating between the **Harris** case and the **Hass** case.

The only argument of respondent not included in the Oregon Supreme Court's decision centers around the wording in the **Harris** case majority opinion, as follows,

> "It does not follow through Miranda that evidence inadmissible against an accused in a prosecutions case-in-chief is barred for all purposes, **provided of course, that the trustworthiness of the evidence satisfies legal standards"**, emphasis added and the following statement,
>
> "Petitioner makes no claim that the statements made to the police were coerced or involuntary".

By those two statements in the majority opinion

of the **Harris** case, the distinction in the instant case can readily be drawn. When a police officer who admittedly is aware of a defendant's constitutional privilege to have counsel present during interrogation and who so advises the defendant, purposely deprives the defendant of that counsel when it was actually sought, in order to incriminate the defendant further, then it appears very difficult to concede that the testimony of the police officer deserves such trustworthiness as to satisfy legal standards. The police officer has arrived at the point where it it more beneficial to him to violate purposely the defendant's constitutional rights and attempt to get the evidence in, than to honor his rights and lose the evidence. In the **Hass** case, any attorney would have been negligent in his responsibility towards the defendant unless he clearly and unequivocally had advised the defendant at the time that this problem arose, to discontinue incriminating himself and to make no further statements and to engage in no further cooperation.

The police officer's testimony was in direct contradiction to that of the defendant as to the defendant's conduct after refusal of his right to an attorney, and the officer's conduct in and of itself, was such as should have caused his testimony to be no more trust-

worthy than that of the defendant.

In the **Harris** case, the Petitioner made no claim that the statements made to the police were coerced or involuntary. In the **Hass** case, it is the defendant's position that a purposeful denial of constitutional rights by the police with knowledge of the defendant's rights would, as a matter of law, cause the statement or conduct to be coerced and involuntary.

CONCLUSION

Based upon the authorities cited herein and the reasons propounded the Respondent requests that Petitioner's appeal be dismissed and in the alternative that the mandate of the Supreme Court of Oregon be in all respects affirmed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 9 1975
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

REPLY TO "ARGUMENT OF QUESTION ONE"

Nothing in the opinion of the Oregon supreme court herein supports respondent's suggestion that the present case is decided on state constitutional grounds. The very fact that the majority opinion finds it necessary to distinguish this case from *Harris v. New York*, 401 U.S. 222 (1971), demonstrates that it is not. Moreover, the prior Oregon cases relied upon by the Oregon supreme court to sustain its holding in this case—*State v. Brewton*, 247 Or. 241, 422 P.2d 581, cert. denied 387 U.S. 943 (1967), and *State v. Neely*, 239 Or. 487, 395 P.2d 557, 398 P.2d 482 (1965)—were, themselves, not predicated on state constitutional grounds, but were attempts to predict how this Court would decide the questions presented therein as matters of federal law. When the

Oregon supreme court bases a decision on state constitutional grounds, it does so expressly. See, *e.g.*, *State v. Brown*, 262 Or. 442, 453, 497 P.2d 1191, 1196 (1972) (interpreting double-jeopardy clause of Oregon constitution). *Cf. State v. Florance*, 99 Or. Adv. Sh. 1997, 2018, — Or. —, 527 P.2d 1202, 1213 (1974) (dissenting opinion).

REPLY TO "ARGUMENT OF QUESTION TWO"

In a case like the one at bar, the right of a State to seek review of federal constitutional questions decided adversely to it by its highest appellate court is not open to question. See, *e.g.*, *California v. Green*, 399 U.S. 149, 153 (1970).

REPLY TO "ARGUMENT OF QUESTION THREE"

Petitioner stands upon the arguments advanced in its opening brief.

CONCLUSION

For the above reasons, as well as those previously stated, the judgment of the Supreme Court of the State of Oregon should be reversed and this cause remanded for the proceedings necessary to cause the judgment of the trial court to be affirmed.

Respectfully submitted,

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January 1975